①

Supreme Court, U.S.
FILED

95 1383 FEB 26 1996

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STEPHEN A. SACCOCCIA,
Petitioner,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Samuel Rosenthal
Curtis, Mallet-Prevost, Colt & Mosle
1801 K Street, N.W., Suite 1205L
Washington, D.C. 20006
(202) 452-7340

Attorney for Petitioner
Stephen A. Saccoccia

161 pp

QUESTIONS PRESENTED

1. Whether the duty of inquiry into multiple representation and requirement of a waiver on the record, as required by Wheat v. United States, 486 U.S. 157 (1988) and Fed.R.Civ.P. 44(c), applies only if petitioner could show that his counsel represented someone who was not only a co-defendant, but who also would have been a "material witness" in petitioner's case.

2. Whether a per se conflict incapable of being waived was created where a second lead trial attorney for petitioner had been indicted and imprisoned on charges involving petitioner, had been listed by the government as a potential witness in this case, was required at trial to cross-examine the same government witness responsible for his own prosecution, and was subpoenaed by the government as a witness in post-trial forfeiture proceedings.

3. Whether a dog's alert to currency was admissible to prove that money laundered by petitioner was derived from narcotics trafficking, after recognizing that other courts are split over whether such evidence lacks probative force as a result of the widespread contamination of currency with narcotics' residue.

4. Whether the "proceeds" deemed forfeitable under the RICO statute includes the total amount of funds belonging to and laundered on behalf of others where it is undisputed that these funds did not represent proceeds of racketeering activity received by the petitioner.

TABLE OF CONTENTS

PAGE NO.

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

I. THIS COURT SHOULD REVIEW THE LOWER COURT DECISION TO IMPOSE ON PETITIONER THE BURDEN OF SHOWING PREJUDICE FROM THE ACTUAL CONFLICTS OF INTEREST EXISTING BELOW 7

  A. The Lower Court Opinion Creates a Conflict Among The Lower Courts Over Whether Warnings About the Dangers of Multiple Representation and a Waiver Are Required Without Regard To Whether Petitioner Could Show Prejudice From that Multiple Representation 8

B. Review is Appropriate to Determine Whether a Second Per Se Sixth Amendment Violation Occurred As a Result of Representation by an Attorney Charged With Crimes Involving the Petitioner. 14

II. THIS COURT SHOULD RESOLVE THE GROWING CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHETHER A DOG'S REACTION TO SNIFFING THE ALLEGEDLY CONTAMINATED MONEY IS INADMISSIBLE. 18

III. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER COULD BE JOINTLY AND SEVERALLY LIABLE FOR FORFEITURE OF MONEYS FROM WHICH HE EARNED NO PROFIT. 24

CONCLUSION 29

Appendix A 1a

Appendix B 1b

Appendix C 1c

Appendix D 1d

TABLE OF AUTHORITIES

PAGE NO.

CASES:

Clark v. United States,
1995 U.S. LEXIS 13046 (2d Cir., May 25, 1995) 10
Glasser v. United States,
315 U.S. 60 (1945) 8, 10
Government of Virgin Islands v. Zepp,
748 F.2d 125 (3d Cir. 1984) 15
Grand Jury Proceedings,
859 F.2d 1021 (1st Cir. 1988) 13
Hamilton v. Ford,
969 F.2d 1006 (11th Cir. 1992) 10
Holloway v. Arkansas,
435 U.S. 475 (1978) 8, 10
Jones v. United States Drug Enforcement Admin.,
819 F. Supp. 698 (M.D. Tenn. 1993) 20
Pinkerton v. United States,
328 U.S. 640 (1946) 7, 26
Reckmeyer v. United States,
709 F.Supp. 680 (E.D.Va 1989) 15
United States v. $53,082 in U.S. Currency,
16 F.2d 245 n.5 (6th Cir. 1993) 19
United States v. $80,760.00 U.S. Currency,
781 F.Supp. 462 n.32 (N.D. Tex. 1991) . 19, 21, 24
United States v. $87,375 in U.S. Currency,
727 F. Supp. 155 (D.N.J. 1989) 19
United States v. $191,910.00 in U.S. Currency,
16 F.3d 1051 n.21 (9th Cir. 1994) 19
United States v. $639,558 in U.S. Currency,
955 F.2d 712 (D.C. Cir. 1992) 19, 20, 21

United States v. Angiulo,
896 F.2d 1169 (1st Cir.) 17

United States v. Cancilla,
725 F.2d 867 (2d Cir. 1984) 17

United States v. Caporale,
806 F.2d 1487 (11th Cir. 1986) 25, 27

United States v. Cirrincione,
780 F.2d 620 (7th Cir. 1985) 10

United States v. Cook,
45 F.2d 388 (10th Cir. 1995) 10

United States v. Cresp de Llano,
838 F.2d 1006 (9th Cir. 1987) 10

United States v. Crockett,
506 F.2d 759 (5th Cir. 1975) 18

United States v. Ellison,
798 F.2d 1102 (7th Cir. 1986) 15

United States v. Faulkerner,
17 F.3d at 774 (5th Cir. 1994) 28

United States v. Fulton,
5 F.3d 605 (2d Cir. 1993) 14, 16, 17, 18

U.S. v. Garcia-Rosa,
876 F.2d 209 (1st Cir. 1989) at 231 . . . . . 13, 16

United States v. Hurley,
63 F.3d 1, 22 (1st Cir. 1995) 26

United States v. LaRouche Campaign,
695 F.Supp. 1290 18

United States v. Levy,
25 F.3d 146 (2d Cir. 1994) 10

United States v. Marren,
919 F.2d 61 (7th Cir. 1990) 11

United States. v. Masters,
924 F.2d 1362 (7th Cir. 1991) 25, 26, 27

United States v. Mazzaferro,
865 F.3d 450 (1st Cir. 1989) 11
United States v. Moscony,
927 F.2d 742 (3d Cir. 1991) 10
United States v. McClain,
823 F.2d 1457 (11th Cir. 1987) 15
United States v. Saccoccia,
823 F.Supp. 994 (D. R.I. 1993) . . . . passim
United States v. Saccoccia,
58 F.3d 754 (1st Cir. 1995) . . . . passim
United States v. Soudan,
812 F.2d 920 (5th Cir. 1986) 15
United States v. Salinas,
618 F.2d 1092 (5th Cir. 1980) 15
Wheat v. United States,
486 U.S. 157 (1988) . . . . i, 9, 10, 11, 12
Wood v. Georgia,
450 U.S. 272 (1981) 12, 18

CODES, RULES AND STATUTES:

U.S. Const. Amend. VI . . . . passim
28 U.S.C. Sec. 1254(1) 2
18 U.S.C. Sec. 1963(a) 3
18 U.S.C. Sec. 1962 3
18 U.S.C. Sec. 1956 3
18 U.S.C. Sec. 1957 3
31 U.S.C. Sec. 5322 3
31 U.S.C. Sec. 5324 3
18 U.S.C. Sec. 1952 3
18 U.S.C. Sec. 982 3
Fed.R.Civ.P. 44(c) . . . . i, 8, 10

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

Nos.

UNITED STATES,

Respondent

v.

STEPHEN A. SACCOCCIA,

Petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Stephen Saccoccia, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered on June 28, 1995, and the subsequent denial of the Motion for Reconsideration on September 27, 1995, and joins in the petition of his co-defendant, Donna Saccoccia, who has filed for a writ of

certiorari from the judgment of the Court of Appeals entered on July 24, 1995.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra), is reported at United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995). The opinion of the district court (App. B, infra), is reported at 823 F.Supp. 994 (D.R.I. 1993). The district court's oral pre-trial rulings with respect to any conflict of interest and denying motions to exclude evidence of a dog sniff (App. C, infra), are not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra) was entered on June 28, 1995. The court of appeals denied rehearing en banc on September 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

---

[1] The only parties in this matter are the United States and Petitioner, Stephen Saccoccia. The companion case involves the following additional parties: Donna Saccoccia, Stanley Cirella, Kenneth Saccoccio, Carlo DeMarco, James Saccoccio and Vincent Hurley.

18 U.S.C. Sec. 1963(a) provides in pertinent part that anyone violating that chapter:

> shall forfeit to the United States, irrespective of any provision of State law --
>
> > (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

STATEMENT OF THE CASE

On November 18, 1991, petitioner, Stephen Saccoccia ("Petitioner"), among others, was indicted in a 152-count indictment. A 143-count superseding indictment was returned on July 22, 1992. It charged a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d); money laundering, in violation of 18 U.S.C. §§ 1956 and 1957; failing to file currency transaction reports (CTRs), causing financial institutions to file CTRs with false information, and structuring transactions to evade currency transaction reporting (CTR) requirements, all in violation of 31 U.S.C. §§ 5322 and 5324; interstate travel in aid of racketeering activity, in violation of 18 U.S.C. § 1952, and criminal forfeiture, in violation of 18 U.S.C. §§ 982 and 1963.

While the indictment was pending against petitioner, his counsel, Jack Hill, was formally accused in Austria of conspiring with petitioner to launder money overseas. Because Hill remained incarcerated overseas, local counsel was ordered to represent petitioner.

A six-week jury trial before the United States District Court for the District of Rhode Island (Torres, J.), began on November 4, 1992, on the original indictment with a total of nine co-defendants. During the trial, petitioner's substitute counsel became incapacitated, requiring that petitioner's case be severed and a mistrial declared.

By this time, original counsel, Hill, had just been released days earlier from jail, and was ordered by the district court to return to Rhode Island to consult with petitioner. Because Hill was still facing a retrial on the very same charges involving his client, Hill himself recognized that this created a conflict and urged the Court to refrain from asking him to take any action in the case. App. 2c. The Government did not oppose Hill's withdrawal, and instead advised the court in a separate letter that Hill could be a witness at trial because of Hill's own activities. The court nevertheless refused to allow Hill to withdraw and advised the defendant that there was "no conflict." App. 3c. The court later accepted a waiver from defendant. Hill was therefore left at trial to cross-examine a government witness, Berkhard Muel, who had been assigned to Hill's own prosecution in Austria.

Shortly after trial was concluded, the government sought to depose Hill in connection with forfeiture proceedings against petitioner. In a memorandum and order issued on September 1, 1995, the District Court ruled that Hill indeed must comply with the notice. In refusing to quash the deposition notice, the District Court observed that Hill (and evidently other counsel representing petitioner), had asserted the privilege against self-incrimination. Memorandum and Order, supra, at 16.

At his re-trial, petitioner was represented by a second lead counsel, Ken O'Donnell, who also represented co-defendant Ray Marotto, who had been severed and acquitted. Although O'Donnell listed Marotto as a potential witness in pleadings filed with the court in Saccoccia's case, no waiver or inquiry of any sort was conducted as to the conflict arising out of this multiple representation.

The jury convicted petitioner on all counts. At sentencing, the District Court imposed terms of imprisonment on Mr. Saccoccia of 660 years. In May, 1993, the Court imposed forfeitures on Mr. Saccoccia, setting out the basis for the forfeitures in an opinion filed on June 4, 1993. See United States v. Saccoccia, 823 F. Supp. 994 (D.R.I. 1993); App. B. The court held that under a theory requiring joint and several liability, petitioner could be ordered to forfeit not only amounts of money which he obtained as "profit" from his illegal activities, but also moneys and other assets that he never owned or even possessed, but which were received by third parties not charged in petitioner's case. Id.

The panel (Selya, Cyr and Boudin, JJ.) affirmed the conviction. In a 79 page opinion authored by Judge Selya, the panel rejected all arguments of the defendant, including those relating to whether his two attorneys labored under conflicts of interest. It found that no per se conflict was created when petitioner was allowed to waive any conflict involving one lead trial lawyer, who was under indictment and had previously been imprisoned in Austria for charges involving petitioner. App. 27a et. seq. The court reasoned that unless petitioner could show that his counsel was not merely named as a co-conspirator with him in another related case, but that he had an actual and reasonable fear of being called to testify against his client, no Sixth Amendment violation arose. App. 29a.

It similarly shifted to the petitioner the burden of showing that there was some conflict and that the defense was prejudiced by the second lead trial lawyer's representation of co-defendant Marotto. App. 29a. There was no inquiry on the record to determine whether petitioner would waive that conflict or was even aware of all of the ramifications of the joint representation. The court found that because there was only "unfounded speculation" to suggest that Marotto could even be a witness, petitioner had failed to sustain the burden of showing how the multiple representation created any conflict of interest. Id., at 772; App. 29a. It did so even though the same conflict-ridden lawyer representing both Marotto and petitioner admitted that Marotto may in fact have knowledge of exculpatory facts, and listed him as a witness in pleadings filed with the district court in support of his motion for a continuance.

Next, the court held that there was no error in allowing a dog "sniff" to establish that currency allegedly laundered by petitioner had been derived from narcotics. App. 39a et seq. Referring to a split among the courts as to whether evidence of currency contamination with narcotics is probative in light of the widespread contamination today, the court acknowledged the differences in approach being taken by the courts, finding that:

> [t]his claim deserves serious attention, for the recent decisions about the evidentiary value of a trained dog's alert to currency are not uniform." [58 F.3d at 777; App. 41c].

The panel further rejected arguments that petitioner could not be ordered to forfeit sums which he never "obtained," as required by the RICO forfeiture provisions. Rather, the court of appeals found itself "substantial[ly in] agreement with the reasoning" in the district court's opinion holding that joint and several liability was proper under Pinkerton v. United States, 328 U.S. 640, 647 (1946), and that petitioner could be ordered to forfeit $136 million. 58 F.3d at 783, incorporating United States v. Saccoccia, 823 F.Supp. at 1001-03.

The court denied rehearing en banc without issuing any written opinion.

REASONS FOR GRANTING THE PETITION.

I. This Court Should Review The Lower Court Decision To Impose on Petitioner the Burden of Showing Prejudice From The Actual Conflicts of Interest Existing Below.

The decision of the court of appeals in this case raises important questions of Sixth Amendment law, arising out of two distinct and independent conflicts of interest facing his two attorneys. The court of appeals held that the petitioner -- not the Government -- had the burden of demonstrating both Sixth Amendment violations by showing some sort of prejudice from the alleged conflicts, and that defendant was not entitled to any sort of evidentiary hearing into either of the two alleged conflicts at which he could attempt to sustain that burden. It held, further, that no waiver and absolutely no inquiry by the trial court was required as to one of the two conflicts.[2]

A. The Lower Court Opinion Creates a Conflict Among the Lower Courts Over Whether Warnings About the Dangers of Multiple Representation and A Waiver Are Required Without Regard to Whether Petitioner Could Show Prejudice From that Multiple Representation.

The court of appeals found that no waiver or any inquiry whatsoever was required even though petitioner was represented by an attorney, Ken O'Donnell, who had represented a co-defendant (and presumably did so during petitioner's trial). Multiple representation of co-defendants, in the lower court's view, did not create a conflict of interest worthy of any waiver or inquiry on the record. That holding is contrary to Supreme Court decisions dating back to Holloway v. Arkansas, 435 U.S. 475 (1978) and Glasser v. United States, 315 U.S. 60, 71 (1945), Fed.R.Cr.P. 44(c), and decisions of other courts of appeals.

---

[2] The court of appeals' opinion does not dispute that a conflict on the part of either attorney would be sufficient to warrant a new trial. See Hoffman v. Leeke, 903 F.2d 280, 287 (4th Cir. 1990)(conflict not harmless error where two counsel present); United States v. Stoia, 22 F.3d 766, 769 (7th Cir. 1994); United States v. Fulton, 5 F.3d 605, 606, 610-11 (2d Cir. 1993).

Referring to claims that a conflict arose as a result of O'Donnell's multiple representation of two co-defendants, the court of appeals reasoned that even without any inquiry on the record as required by Rule 44c, this sort of multiple representation created "no conflict", see 29a, and that it had "routinely dismissed analogous conflict of interest claims." 58 F.3d at 772; 30a. In fact, the converse is true: convictions are routinely reversed where no waiver or other inquiry is conducted in cases involving multiple representation. Unless the court of appeals' opinion is reviewed by this Court, it will conflict with other appellate decisions holding that the defendant does not have the burden of showing why he should be warned about the perils of multiple representation.

Contrary to that ruling by the court of appeals, this Court and a majority of the courts of appeals have held on innumerable occasions that such an inquiry is required in all cases involving multiple representation. The most recent Supreme Court decision imposing an independent duty on the court to inquire into any multiple representation is Wheat v. United States, 486 U.S. 157, 160 (1988). The Court held in that case:

> While 'permitting a single attorney to represent codefendants ... is not per se violative of constitutional guarantees of effective assistance of counsel,' Holloway v. Arkansas, 435 U.S. 475, 482, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978), a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel. [emphasis added].

Nor were Holloway, supra, and Wheat, supra, the first pronouncements on the subject. The Court ruled to the same effect fifty years ago in Glasser v. United States, 315 U.S. 60, 71 (1945) (waiver should be clearly determined on the record).

But even if the Supreme Court had not spoken to the subject in an unbroken line of cases over the last fifty years, Fed.R.Cr.P. 44(c) would have required an inquiry and waiver from the defendant, and beyond that, decisions of this and other circuit courts require a waiver on the record whenever an attorney is allowed to represent either a person who was jointly indicted or jointly tried with the defendant.

By departing from cases holding that multiple representation created a conflict of interest, the lower court necessarily departed as well from rulings by those courts relating to the remedy required for failing to address the problems of multiple representation. Other circuits hold that the failure to elicit such a waiver requires an "automatic" reversal. See, e.g., Ciark v. United States, 1995 U.S. LEXIS 13046 (2d Cir., May 25, 1995); United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994) ("When a possible conflict has been entirely ignored, reversal is automatic ...."); United States v. Moscony, 927 F.2d 742, 748-50 (3rd Cir. 1991); United States v. Cirrincione, 780 F.2d 620, 625 (7th Cir. 1985); United States v. Cresp de Llano, 838 F.2d 1006, 1012 (9th Cir. 1987); United States v. Cook, 45 F.2d 388 (10th Cir. 1995); Hamilton v. Ford, 969 F.2d 1006, 1011 (11th Cir. 1992) (reversal automatic when no inquiry because "the trial court has failed to discharge its constitutional duty under Holloway to determine whether the defendants are receiving adequate assistance of counsel").

By contrast, even before the instant case, the First Circuit had departed from the above cases and had declined to adopt an "automatic" reversal rule. Instead, it had held in United States v. Mazzaferro, 865 F.3d 450, 454 (1st Cir. 1989), that "[i]f a satisfactory inquiry does not appear on the record, the government has the burden of persuasion of demonstrating that prejudice to the defendant was improbable." With the instant decision, the differences between the First Circuit's approach and that taken elsewhere is now even greater by shifting to away from the government and onto the petitioner's shoulders the burden of demonstrating that such a conflict impacted on the representation.

Accordingly, the only ground offered by the panel for departing from Wheat and other cases cited above was that defendant failed to show that Marotto had "any knowledge that might have been useful in appellant's defense," 58 F.3d at 772, 30a; and that defendant had failed in his efforts to show how "O'Donnell's concluded representation of Marotto created a conflict of interest...." Id.[3]

---

[3] The panel did not articulate any exception to the duty of inquiry based on some untested assumption that O'Donnell's representation of Marotta had ceased by the time of Saccoccia's retrial. Nor would any theory be viable here. Rule 44 requires prophylactic action whenever there is representation of those jointly indicted; it nowhere limits that rule to persons who proceed jointly to trial. See United States v. Simonetti, 998 F.2d 39, 41 (1st Cir. 1993)(even where the prior representation of a co-defendant or witness ends, the "conflict of interest with [that client] remained, however"). 998 F.2d at 40. The court went on to explain that because the lawyer is duty bound not to use confidences learned from that client, he cannot "vigorously defend[] [the defendant] without a waiver from [the prior client]." 998 F.2d at 41, citing United States v. Marren, 919 F.2d 61, 63 (7th Cir. 1990).

But this burden shifting is not only at odds with this Court's repeated rulings, it imposes on the defendant a burden which is practically impossible to sustain. As the Government itself recognized in urging this Court to adopt strong curative measures to deal with the perils of multiple representation:

> The dilemmas created by multiple representation are particularly insidious because it is often hard to determine whether the resolution of those dilemmas is the product of trial strategy rather than a conflict of interest. ... And it is particularly difficult to assess the damage caused by multiple representation, because the evil is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and the sentencing process. .... [Brief of United States, Wheat v. United States, No. 87-4, at 19; citations omitted].

Moreover, the impropriety in shifting the burden to the petitioner to show prejudice was exacerbated here by the court of appeals insistence that petitioner sustain that burden based on the record created by the very attorney who was laboring under the conflict. Where further fact finding is necessary, it is appropriate to remand the matter, and allow the defendant an opportunity to make an appropriate factual record with the assistance of conflict-free counsel. See Wood v. Georgia, 450 U.S. 272, 273-74 (1981)(vacating and remanding the matter so that the court could "hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed...."). In fact, it was particularly erroneous for the court of appeals to engage in such fact finding in the first instance where no adequate findings had been made below. In Re Grand Jury Proceedings, 859 F.2d 1021, 1026 (1st Cir. 1988)(remanding for "specific findings of fact regarding any perceived conflict of interest").

Finally, the precedential support for the First Circuit's approach is simply misplaced. Evidently, the First Circuit confused the situation here -- arising from multiple representation of jointly indicted defendants -- where warnings are always required as long as the court is aware of the facts creating the potential conflict -- with the far more difficult situation presented where a defendant claims that the lawyer represents someone who is merely a witness, but there is no showing that that person would actually have testified and the matter is not brought to the trial court's attention until post trial proceedings. See 58 F.3d at 772, citing U.S. v. Garcia-Rosa, 876 F.2d 209 (1st Cir. 1989) at 231 (involving representation of a person claimed to be a potential witness, but without any basis in the record).

Here, Marotto was both a co-defendant and a potential witness. Without question, Marotto's status as both a co-defendant and a potential witness were made known to the trial court here. In fact, not only had the lower court presided over Marotto's severed trial, but counsel identified Marotto as a potential witness in petitioner's case. Also, both the district court and the court of appeals alluded to counsel's representation of Marotto as one reason why defense counsel should have been prepared to proceed to trial in Saccoccia's case without a continuance. 58 F.3d at 771; 25a. Notwithstanding the lower court's awareness of that relationship, the court of appeals reasoned that no waiver by the defendant or even any inquiry whatsoever was required into the multiple representation.

B. Review is Appropriate to Determine Whether a Second Per Se Sixth Amendment Violation Occurred As a Result of Representation by an Attorney Charged With Crimes Involving the Petitioner.

Not only did the panel affirm the conviction even though no waiver or inquiry had been conducted as a result of O'Donnell's multiple representation of petitioner, it found no error also even though a second lead attorney, Jack Hill, had been formally accused and imprisoned for allegedly conspiring with the petitioner -- his own client; even though Hill had been told by the government that he may be a witness against the client in the instant case; even though Hill was forced to cross-examine his own accuser in the proceedings against his client; and finally, even though the government would later seek to depose counsel on his dealings with petitioner. The court allowed petitioner to waive the resulting conflict, and expressly advised him on the record that no conflict of interest or grounds for withdrawal existed. App. 3c.

But a long line of cases has now held that an "actual" conflict of interest exists under circumstances far less troublesome than those present here. Courts have even held that a per se Sixth Amendment violation is created when counsel does nothing more than represent a client while under investigation for conduct involving that same client. See United States v. Fulton, 5 F.3d 605, 613 (2d Cir. 1993)(cases collected); Government of Virgin Islands v. Zepp, 748 F.2d 125, 136 (3d Cir. 1984)("when defense counsel has independent personal information regarding the facts underlying his client's charges, and faces potential liability for those charges, he has an actual conflict of interest"); United States v. Soudan, 812 F.2d 920, 928 (5th Cir. 1986), cert. denied, 481 U.S. 1052 (1987)("In those cases in which the trial defense counsel faces potential liability for the same charges which are faced by his client, the defense counsel has an actual conflict of interest"); United States v. Salinas, 618 F.2d 1092, 1093 (5th Cir. 1980)(disqualifying an attorney who was a target of investigation over defendant's objections and notwithstanding waiver), cert. denied, 449 U.S. 961 (1980); United States v. McClain, 823 F.2d 1457, 1464 (11th Cir. 1987)(finding an "actual conflict of interest" resulting from the fact that counsel was under investigation while defending his client on the same or similar charges); United States v. Ellison, 798 F.2d 1102, 1007 (7th Cir. 1986)(finding an actual conflict of interest). See also Reckmeyer v. United States, 709 F.Supp. 680, 689-91 (E.D.Va. 1989), aff'd without op., 900 F.2d 257, cert. denied, 498 U.S. 846 (1990).

This case therefore presents a clear and unmistakable basis for applying the per se rule articulated in the above cases, and refusing to accept a waiver, particularly after telling the petitioner that there was no conflict of interest or basis for allowing withdrawal by the attorney. App. 3c. In fact, none of the above cases involved situations where the attorney had not only been actually charged with crimes involving the client, but after being released from prison on such charges, was being asked to cross-examine his own accuser in proceedings against the attorney, had been told by the Government that he might well be a witness at the trial of his client and would later be deposed by the government about his dealings with petitioner.

The lower court opinion stands entirely alone in holding that no actual conflict of interest -- much less a per se violation -- is shown in such circumstances unless the petitioner shouldered the burden of showing that "'some plausible alternative defense strategy might have been pursued, ... and that this alternative strategy was not pursued because of the attorney's other loyalties or interests.'" 58 F.3d at 771, quoting from United States v. Garcia-Rosa, 876 F.2d 209, 231 (1st Cir. 1989), cert. granted and vacated on other grounds, 498 U.S. 954 (1990). In short, not only did the panel refuse completely to follow those cases holding that some conflicts are so violative of the criminal justice system that they cannot be waived, the court of appeals again shifted the burden to the defendant to show that there was some prejudice from an conflict of interest.

Furthermore, the lower court's explanation of what a defendant must do to sustain that burden shows even more dramatically the divergence between the approach taken by the First Circuit, and that taken by every other circuit to address the problem. Fulton, supra, and the cases set forth above, hold that it would be unrealistic to assume that counsel under investigation should be asked to waive his Fifth Amendment privilege and advise the court precisely how his indictment or the allegations against him may prejudice the defense. As the court in Fulton, recognized, counsel should not be expected to speak to allegations raised by a witness implicating him as "this subject could be used against [him]." Fulton, 5 F.3d at 608. Other courts recognize also that the more fearful the defense counsel is about the possibility of his own prosecution being impacted by the defense, the less likely it is that he will be candid with the court about those fears.

By contrast, the court of appeals held that defendant could only sustain his burden if he could prove that defense counsel was actually operating under such a fear in the case and that a waiver should therefore not have been accepted.[4] 58 F.3d at 771-72; 28a-29a. The lower court concluded that a disqualifying conflict might have been created only if Hill had actually and reasonably been in fear of having been "charged or called as a witness in appellant's case...." Id., at 772; 29a. It did so even though when Hill was actually ordered to testify in post-trial forfeiture proceedings, Hill did exactly what the Fulton and other courts predicted: he asserted his own Fifth Amendment privilege against self-incrimination.[5]

---

[4] While the court of appeals cited one case finding a per se Sixth Amendment violation as supposedly supporting its position, 58 F.3d at 772, citing United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984), the panel departed from the holding there. Cancilla nowhere suggested that a defendant must show some proof that there was actually some demonstrable impact on the representation he received in order to benefit from the rule articulated in that case. Rather, the court in Cancilla assumed that representation may have been affected and expressly held that it was sufficient as long as "counsel might have feared that acceptance of a plea [or a vigorous defense] would turn on [the client's cooperation], which might lead to discovery of the link to counsel's own activities." 725 F.2d at 870 emphasis added.

[5] Of course, fear of being a witness, standing alone and without regard to charges that Hill conspired with his client, would have presented an independent basis for insisting that Hill withdraw from the case. See, e.g., United States v. Angiulo, 896 F.2d 1169, 94 (1st Cir.), cert. denied, 498 U.S. 845 (1990); United States v. Zepp, supra, 748 F.2d at 138 ("We have searched the cases carefully and have found no instance where

Even assuming arguendo that the Fulton and other courts are correct in assuming prejudice under such circumstances, this Court should nevertheless review whether defendant was properly denied an evidentiary hearing at which he could sustain that burden. Instead of remanding the matter for an evidentiary hearing, the panel again relied upon the record compiled by conflict-ridden counsel, and without the benefit of any findings by the lower court. As explained above, that holding conflicts with long-standing authority. See Wood v. Georgia, supra (vacating and remanding the case).

II. THIS COURT SHOULD RESOLVE THE GROWING CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHETHER A DOG'S REACTION TO SNIFFING THE ALLEGEDLY CONTAMINATED MONEY IS INADMISSIBLE.

In order to establish that money allegedly laundered by petitioner had been derived from drug trafficking, as required in order to sustain a conviction, the government relied in this case on evidence that a trained dog "alerted" to the money after it was placed in a bank. The court of appeal expressly recognized that a conflict exists among other courts

---

defense counsel was actually permitted to testify against his own client while purporting to continue in a representative capacity"); United States v. Crockett, 506 F.2d 759, 761 (5th Cir. 1975)(finding "conspicuous impropriety" from counsel's failure to withdraw when he realized he was to be a prosecution witness); United States v. LaRouche Campaign, 695 F. Supp. 1290, 1315 (D. Mass 1988) (recognizing that the advocate-witness rule generally bars an attorney from appearing as both an advocate and a witness in the same litigation).

as to the probative value of such evidence. It concluded -- properly we believe on this limited point -- that "[t]his claim deserves serious attention. . . ." 58 F.3d at 777; 41a. Because the decision below conflicts with recent decisions from the Sixth and Ninth Circuits, as well as various lower courts, review by this Court is necessary.

In the wake of repeated scientific studies showing that an astounding percentage -- ranging from one third to 97 percent[6] -- of the currency supply in this country is tainted with narcotics, a growing number of courts are questioning the reliability of such evidence and finding evidence of a narcotic-trained dog's alert to currency of extremely little probative weight. See United States v. $53,082 in U.S. Currency, 985 F.2d 245, 250 n.5 (6th Cir. 1993) ("the evidentiary value of a narcotics detection dog's alert has recently been called into question"); United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1062 n.21 (9th Cir. 1994) (expressing concern about reliability of dog alert given contamination of money supply); United States v.

---

[6] See United States v. $53,082 in U.S. Currency, 985 F.2d 245, 250 n.5 (6th Cir. 1993) (quoting Dirty Money, United States Banker, October 1989, at 10, which discussed a study by Lee Hearn, Chief Toxicologist for Florida Dade County Medical Examiner's Office, in which he found that 97% of the bills from around the country tested positively for cocaine); United States v. $87,375 in U.S. Currency, 727 F. Supp. 155, 160 (D.N.J. 1989) (study conducted by Jay Poupko, Ph.D., showing all the bills in circulation were contaminated); United States v. $80,760.00 in U.S. Currency, 781 F. Supp. 462, 475-76 n.32 (N.D. Tex. 1991) (study of National Medical Services in Willow Grove, Pennsylvania -- 80% of bills tested were contaminated), aff'd, 978 F.2d 709 (5th Cir. 1992); Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698, 720 (M.D. Tenn. 1993) (DEA study found one third of the bills from a random sample and all of the currency sorting belts at the Federal Reserve Banks were contaminated).

$639,558 in U.S. Currency, 955 F.2d 712 (D.C. Cir. 1992)(court cautioning that "If the information related above proves accurate, a court considering whether a dog sniff provides probable cause, . . . may have to take into account the possibility that the dog signalled only the presence of money, not drugs"); United States v. Carr, 25 F.3d 1194, 1271 (3d Cir. 1994) (Becker, J. concurring in part and dissenting in part) (strong presumption against admissibility of evidence of canine's alert to currency, rebuttable only if the government clearly and convincingly establishes, outside the presence of the jury, the relevance and non-prejudicial character of the offered evidence).

For example, when a claimant in Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698 (M.D. Tenn. 1993), sought return of funds following summary forfeiture of $9,000 seized from him at an airport, the court concluded that the probative value of a narcotic-sniffing dog's alert to currency was microscopic. Id. at 721 (emphasis added). "The presence of trace narcotics on currency does not yield any relevant information whatsoever about the currency's history." Id. at 720 (emphasis added). The court explained that bills become contaminated by proximity to a large quantity of cocaine, by passage through contaminated cash registers, cash drawers, and counting machines at banks and commercials establishments, and sorting machines at the Federal Reserve Banks, and by bank tellers counting and recounting money, rubbing one bill against another. Id. at 720. Under these circumstances, "the continued reliance of courts and law enforcement officers on dog sniffs to separate 'legitimate' currency from 'drug-connected' currency is logically indefensible." Id. at 721.

Similarly, in United States v. $80,760.00 in U.S. Currency, 781 F. Supp. 462, 476 (N.D. Tex. 1991), the court held that "the mere fact that a dog alerts to the currency, without other probative evidence linking the currency to violation of the drug laws, will not support forfeiture." Id. at 477. If a dog's alert is not sufficient to prove probable cause for a belief that a substantial connection exists between the currency and illegal drug dealing, id. at 472, it should be even less compelling to prove beyond a reasonable doubt that the money was in fact the proceeds of illegal narcotic business.

The court of appeals in the instant case, however, offered no principled reason for departing from those cases finding such evidence to be inherently prejudicial and devoid of probative value. In fact, the only ground offered for departing from such cases is factually wrong: that "appellant neither introduced nor proffered the materials discussed by other courts suggesting that a very high percentage of United States currency is contaminated with drug residue...." 58 F.3d at 777, n. 19. In fact, petitioner relied on the identical two "materials" discussed in those cases.

First, the expert testifying in this case, Dr. Woodford, was the identical individual relied upon by those courts questioning the use of dog "sniffs." In United States v. $639,558 in U.S. Currency, 955 F.2d 712 (D.C. Cir. 1992), the defendant called Dr. Woodford, the same expert who testified in this case, who testified "that 90 percent of all cash in the United States contains sufficient quantities of cocaine to alert a trained dog." Id. at 714 n.2. In the case at bar, Dr. James Woodford, again testified as an expert, and again without contradiction, that dog sniffing drug tests of currency are deemed unreliable by the scientific community at large.

Specifically, Dr. Woodford explained that, based on tests conducted on currency at the Federal Reserve Banks, anywhere from 70 to 90 percent of currency has illegal drug residues on it, so that a positive dog sniffing drug test means nothing more than that the money in question is consistent with 70 to 90 percent of all money in circulation. According to Dr. Woodford's testimony, this is so in part because bills with drug residues are placed with other bills without residues, contaminating them -- which is exactly what happened in this case when the bank employee placed the tested money into circulation again without cleaning it. Tr. Feb. 23, 1993, at 116.

Despite this testimony, in denying the defendant's motion for new trial, the District Court concluded:

> [T]he fact that there was evidence that trained dogs detected the presence of cocaine on some of the currency that was brought into banks by certain of Mr. Saccoccia's confederates, does not conclusively prove that Mr. Saccoccia or the confederates were engaged in drug trafficking. It is pretty powerful evidence that these bills were connected with drug trafficking at some point. But certainly it does not conclusively prove that it was these Defendants who engaged in the activity that caused the bills to become tainted . . . . [I]t constitutes [a] link in the chain of evidence necessary to convict.

Tr. Apr. 19, 1993, at 107; 6c. Contrary to the District Court's holding, such evidence is only "powerful evidence" of the widespread contamination of U.S. currency. While the probative value of such evidence is "microscopic" the prejudicial effect is astounding, particularly where there is such scant evidence of a link to narcotics, and a dearth of any evidence of a link with any narcotic transactions.

A second item relied upon both below and in other cases criticizing the use of dog "sniffs" was a DEA report confirming the widespread contamination of U.S. currency with narcotic residue. As explained in Jones, 819 F. Supp. at 720 (citations omitted), the report showed that the DEA's own chemists found "one-third of the bills in a randomly selected sample were contaminated with between 2.4 and 12.3 nanograms of cocaine per bill. The belts used at Federal Reserve Banks to sort currency were contaminated with approximately 200 nanograms of cocaine per belt."[7]

But this same report was similarly relied upon by the defense at trial in this case. In fact, when the defense argued to the court of appeals that it should have been allowed to make greater use of the report at trial, the government argued that Dr. Woodford had made ample use of the report when he "described the DEA report's conclusions and testified that he had relied on those findings." Gov't Br. at 26, n.7.[8]

---

[7] Other government sources also strongly question the value of narcotic dog alert testimony relating to tainted money. Charles S. Saphos, Chief of the U.S. Justice Department's Narcotic and Dangerous Drugs Section stated, "I would not want to walk into court and rely exclusively on a dog sniff for a forfeiture of money." He continued that "[t]here are a lot of guys out there that have shown that there is a trace [of] dope on a lot of money out there. And for that reason alone, I'd want more than just the dog." $53,082 in U.S. Currency, 985 F.2d at 250 n.5 (quoting Use of Drug-Sniffing Dogs Challenged: ACLS Back Complaint by Men Whose Pocket Cash Was Seized, Wash. Post, May 6, 1990, at D1).

III. The Court Of Appeals Erred In Holding That Petitioner Could Be Jointly And Severally Liable For Forfeiture Of Moneys From Which He Earned No Profit.

The court of appeals affirmed also the judgment that petitioner could be ordered to forfeit $136 million on the theory that he was jointly and severally responsible for the acts of his co-conspirators, and therefore could be ordered to forfeit not only assets which he received in the form of proceeds of his criminal conduct, but proceeds obtained by others as well. The lower court opinion, adopted by the court of appeals, confessed that the conclusion to be reached on this question was "not so clear." United States v. Saccoccia, 823 F.Supp. 994, 1001 (D.R.I. 1993). Because the court of appeals opinion below is a marked departure from the approach taken by other courts, and involves an important and recurring question of forfeiture law, review by this Court is appropriate.

---

[8] Additionally, the manner in which the test was conducted in the case sub judice, made it even less reliable. of significantly less probative value, but of immense prejudicial effect. The dog's "handler" testified that at each bank, he initially walked the dog through the banks' common areas on a leash but he did not order the dog to alert to any odors. Tr. Feb. 23, 1993, at 129-133. He then led the dog to a separate room containing no other currency other than the suspect money, which was simply placed on the floor. He released the dog and then commanded him to sniff for narcotic odors. Id. No control pile was tested, nor was their a field test of the money after the dog "alerted." Tr. Feb. 23, 1993, at 141-142. Instead, he allowed the bank employee to place the money back into circulation. Tr. Feb. 23, 1993, at 116. See $80,760.00 in U.S. Currency, 781 F. Supp. at 478 ("[v]erification, supported by testimony of the dog's handler, is an essential prerequisite to consideration of the evidence").

To be sure, other court of appeals below have held that defendants may be held jointly and severally liable for forfeiture of proceeds received by one or more of them. See, e.g., United States v. Caporale, 806 F.2d 1487, 1506 (11th Cir. 1986), United States v. Masters, 924 F.2d 1362 (7th Cir.), cert. denied, 500 U.S. 919 (1991). The court of appeals is alone, however, in stretching this concept to allow forfeiture from the defendant of moneys or other property which the defendant never retained, which in no sense could be considered profit to him from his criminal activities, and which were never even made available to any defendant for his own use. To allow forfeiture of funds in such instance would constitute a perversion of the statutory language which is controlling on this question.

The sole authority for ordering forfeiture of $136 million is found in the statutory provision, allowing forfeiture of "any property ... which the person obtained ..." from racketeering activity. 18 U.S.C. Sec. 1963(a)(emphasis added). The district court and court of appeals utterly misread that provision by construing it to hold that an interest may be forfeitable even though the person from whom forfeiture is sought never obtained such property, but instead, the property subject to forfeiture was obtained by others thought to be uncharged co-conspirators of the defendant.

While deciding the issue in favor of imposing joint and several liability, the court of appeals acknowledged that the issue was a difficult one. In ruling on the identical claim raised by petitioner's co-defendants, the court of appeals held that such an outcome seemingly violated the statutory language which "speaks of a violator forfeiting 'proceeds which the person obtained' by violating section 1962." See United States v. Hurley, 63 F.3d 1, 22 (1st Cir. 1995). It further acknowledged the unfairness that might result from such a reading of the statute:

> the plight of a defendant who was merely a temporary custodian of cash and passed it on is even starker than that of a person who never possessed the cash at all. Thus, there is a respectable basis for holding that vicarious liability for co-conspirator behavior does not exist under section 1963. [Id., at 22].

The court of appeals found that such arguments were overcome, however, by simply applying the reasoning of Pinkerton v. United States, 328 U.S. 640, (1946), to the forfeiture provisions. But that conclusion was premised on the entirely erroneous notion that Pinkerton, is applicable to punishment. In fact, it is only applicable to the issue of whether liability can be imposed, not the wholly distinguishable issue of what punishment to impose once liability is established. Indeed, any notion that Pinkerton is applicable to the issue of punishment would result in ludicrous results. A court presumably could aggregate not only forfeiture amounts, but terms of incarceration as well.

Moreover, the court of appeals failed to acknowledge that every other case to impose "joint and several" liability did so where, unlike here, assets were acquired or maintained solely by the defendants on trial, and there was some factual basis for concluding that these particular defendants were the ultimate recipients or beneficiaries of the forfeitable assets. For instance, in Masters, the court held that "it is the proceeds received by the defendants, not by their enterprise, that are forfeitable." Id., at 1370. It therefore went on to hold that the amount forfeited "was a reasonable estimate of the total amount that the three defendants kept from the bribes that Masters received." Id., at 1370 (emphasis added).

Similarly, in Caporale, the court acknowledged some difficulty discerning which defendant profited from specific amounts of money, but nevertheless made clear its view that if joint and several liability were to be imposed, it is limited to joint and several liability of those amounts forfeitable solely by those convicted -- not unnamed and uncharged individuals having only the most remote connection to the alleged conspiracy. The court held:

> The statute states that individuals convicted of violating Section 1962 shall forfeit any interest acquired as a result of the violation. 18 U.S.C. Sec. 1963(a)(1). The four individuals subject to the forfeiture order at issue here .... were each convicted of violating Section 1962 and ordered to forfeit the proceeds of the violation. As individuals convicted under Section 1962, they fall squarely within the forfeiture provision. [806 F.2d at 1507; emphasis in part in original and in part added].

And finally, the Fifth Circuit again construed the statute in accordance with its plain language. In answering claims that defendants there could not be forced to forfeit sums of money which they did not receive, but which went to family members and businesses, the Fifth Circuit held that defendant was shown to have "acquired or maintained" the forfeitable sums by controlling the disbursement of the proceeds and directing disbursement to accounts of their choosing. United States v. Faulkerner, 17 F.3d at 774 (5th Cir. 1994).

Below, by contrast, the court of appeals utilized joint and several liability to require forfeiture not only of assets "acquired" by defendants on trial, but also ordered forfeiture of those assets acquired by persons thousands of miles away who were not even charged with any crimes, in many cases not even named in the indictment, and in other cases, not even identified at trial. To impose liability in such circumstances would turn the statute on its head. Only by aggregating all funds involved in transactions involving defendant was the court able to come up with the staggering $136 million forfeiture order at issue here.

The approach taken by the Fifth, Seventh and Eleventh Circuits is a far cry from the theory adopted below, in which it was possible for the petitioner to exercise absolutely no control over the alleged proceeds of the money laundering activities, but to be held accountable for them in a forfeiture order because some unnamed co-conspirator exercised such control.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

Curtis, Mallet-Prevost, Colt & Mosle
By: SAMUEL ROSENTHAL
1801 K Street, N.W., Suite 1205L
Washington, D.C. 20006
(202) 452-7340

Attorney for Defendant-Appellant
Stephen A. Saccoccia

Dated: February 26, 1996

APPENDICES

APPENDIX A

UNITED STATES of America, Appellee,

v.

Stephen A. SACCOCCIA, Defendant, Appellant.

Nos. 93-1618, 93-2208, and 94-1506.

United States Court of Appeals,
First Circuit.

Heard Feb. 7, 1995.

Decided June 28, 1995.

Before SELYA, CYR and BOUDIN, Circuit Judges.

SELYA, Circuit Judge.

A Jury convicted defendant-appellant Stephen A. Saccoccia on racketeering, money laundering, and related charges arising from the leadership of an organization that laundered well over $100,000,000 in drug money during the years 1986 through 1991. On appeal, Saccoccia challenges his extradition , the timing of his trial, his conviction, the forfeiture of certain assets, and the 660-year sentence that the district court imposed. Finding that his arguments do not wash, we affirm.

I. BACKGROUND

We sketch the bareboned facts in the light most amiable to the government, see United States v. Ortiz, 966 F.2d 707, 710-11 (1st. Cir.1992), cert. denied,, -- U.S. --, 113 S.Ct. 1005, 122 L.Ed.2d. 154 (1933), leaving much of the flesh and sinew for fuller articulation in connection with or discussion of particular issues.

Appellant formerly controlled a network of precious metal businesses located in Rhode Island, New York, and California. He became enmeshed in money laundering through his involvement with a fellow metalman, Barry Slomovits. At a point in the mid-1980s, Slomovits was accepting millions of dollars in cash each week from Duvan Arboleda, who represented a group of Colombian drug lords (the Cali cartel). Slomovits used some of this cash to purchase gold from appellant. By special arrangement, the transactions were accomplished without documentation.

In 1987, Arboleda and appellant agreed that they would deal directly with each other. From that juncture forward, appellant used his various businesses to cleanse money funnelled to him by the Cali cartel and its emissaries (including Arboleda, Fernando Duenas, and Raoul Escobar). Typically, Arboleda would make large quantities of cash available to appellant; appellant would send some of it to Slomovits in New York; Slomovits would buy gold with the funds, resell the gold, and wire the proceeds to accounts that appellant controlled. Slomovits received apocryphal invoices from appellant's companies purporting to show sales of gold for summons corresponding to the amounts of the wire transfers.

Ahron Sharir, a manufacturer of gold chain, also washed money for appellant. Appellant used Sharir's New York factory as a drop-off point for incoming shipments of currency, and Sharir laundered the cash by methods similar to those employed by Slomovits. The shipments to Sharir's factory continued until 1988. From then on, the two men forsook the New York factory, but continued to deal with each other. Appellant delivered cash totalling over $35,000,000 to Sharir at other locations between 1988 and 1990.

By 1990 appellant's operations had expanded and had become largely independent of Slomovits. Appellant would bid for opportunities to launder money on behalf of the Cali cartel. When the cartel accepted a bid, he or his couriers would receive sacks of currency at prearranged delivery points. These shipments ordinarily ranged between $500,000 (although one delivery totalled $3,000,000). The bills were usually in small denominations. They would be counted, transported to one of appellant's offices in California or Rhode Island, then counted again, smurfed,[1] and used to buy cashier's checks payable to one of appellant's companies. These purchases were made at various banks by underlings (e.g., David Izzi, Anthony DeMarco, James Saccoccio, Kenneth

---

[1] The conspirators sought to avoid the currency transaction reporting requirements applicable to large cash transactions, see, e.g., 31 U.S.C. § 5313 (1988); 31 C.F.R. § 103.22(a)(1) (1994), by subdividing the cash into units of less than $10,000. The process of breaking down a large amount of cash into smaller, unreportable amounts--a criminal act when done to avoid the reporting requirements, see 31 U.S.C.A. § 5324 (West Supp. 1995)--is called "smurfing."

Saccoccio) in accordance with instructions received from appellant or his wife, Donna Saccoccia. After the checks had been deposited in a company account, the money would then be wired to a foreign bank designated by Arboleda or Duenas. Along the way, appellant would deduct a commission that usually approximated ten percent of the laundered cash. This completed "la vuelta," the term used by the Cali cartel to describe a complete cycle of drug smuggling activities.

The spring of 1991 marked the beginning of the end of appellant' career in high finance. During the early stages of his operation, the money received in New York was transported to Rhode Island by armored car and then deposited in account standing in account standing in the name of a controlled corporation, Trend Precious Metals (Trend), at Citizens Bank. Between January 1, 1990 and April 2, 1991, appellant and his wife wired over $136,000,000 out of the Trend account to an assortment of foreign banks. Citizens became suspicious and closed the account. In approximately the same time frame, an employee of an armored car service warned Richard Gizarelli, an unindicted coconspirator, that appellant was under investigation. Gizarelli promptly informed appellant.

Notwithstanding these omens, appellant persisted. He did, however, alter his modus operandi. Instead of using private couriers to transport cash from New York to Rhode Island, he sent any of four men -- Izzi, Carlo DeMarco, Anthony DeMarco, or Vincent Hurley, often (but not always) operating in pairs -- to haul the money to Rhode Island. And, although appellant's cohorts continued to purchase bank checks from various Rhode

Island financial institutions, appellant began to send the checks to his office in California by air courier, often in canisters labeled as containing gold (to which appellant's hench-men added slag or scrap metal to increase weight). Accomplices used the money to purchase gold, which was then sold on the open market. The proceeds were eventually wired back to one of appellant's remaining Rhode Island accounts.

In August of 1991, appellant convened a meeting at his mother's home. He showed the conferees (who included Donna Saccoccia, Izzi, and the two DeMarcos) a videotape that had been discovered accidentally in a nearby building. The tape reflected an ongoing surveillance of the back entrance to appellant's Cranston coin shop. He advised his colleagues to start using the store's front entrance. Soon thereafter, appellant departed for Switzerland. In short order, the authorities indicted and extradited him.

After unsuccessfully seeking to postpone prosecution on health-related grounds,[2] appellant went to trial on November 4, 1992, in the United States District Court for the District of Rhode Island, along with several other indicted coconspirators (including his wife). Appellant's attorney became ill during trial, and the court declared a mistrial as to appellant.[3] The new trial began on February 7, 1993, and resulted in this conviction. These appeals followed.

---

[2] The district court held a hearing regarding appellant's professed ailments. Appellant had undergone a laminectomy at age 14 and had been hospitalized repeatedly during the next 20 years. He suffered a relapse while he was incarcerated in Switzerland, necessitating bed rest and medication. After being returned to the United States, appellant claimed to have reinjured his back. He also claimed that, on the eve of trial, a prison guard assaulted him, aggravating his condition. The court heard testimony from three physicians and concluded that "there [were] no objective findings by any doctor that would confirm the existence of any physical problem that would account for [appellant's current] complaints of pain." Accordingly, the court refused to grant a continuance.

Saccoccia's appeals were consolidated for oral argument with the appeals arising out of the first trial. See supra note 3. Notwithstanding the obvious differences in the trial records and in the posture of the prosecutions -- for example, appellant was the leader of the money laundering organization; unlike most of the others, he was not tried for currency transaction reporting (CTR)offenses; and he was convicted in a trial different from that of his codefendants -- appellant seeks to incorporate by reference eight arguments advanced by other defendants. Because appellant's position is not substantially similar to that of the codefendants, and because he has failed to develop the idiosyncracies of his own situation, we deem five of those arguments to have been abandoned.[4] See United States v. David, 940 F.2d. 722, 737 (1st Cir.1991)("Adoption by reference, however, cannot occur in a vacuum; to be meaningful the arguments adopted must be readily transferrable from the proponent's case to the adopter's case.") cert. denied, 504 U.S. 955, 112 S.Ct. 2301, 119 L.Ed.2d. 224 (1992).

---

[3] The first trial proceeded as to the other defendants. The jury returned its verdict on December 18, 1992, convicting Donna Saccoccia, Vincent Hurley, James Saccoccio, Kenneth Saccoccio, Stanley Cirella and Anthony DeMarco on the RICO conspiracy count, 18 U.S.C. § 1962(d), and finding each of them guilty on certain other counts. Donna Saccoccia was convicted of 47 counts of money laundering under 18 U.S.C. § 1957 and 13 counts of money laundering under 18 U.S.C. § 1956(a)(2); Hurley was convicted of one count of structuring transactions to avoid currency reporting requirements, see 31 U.S.C. § 5324(a)(3), and one count of interstate travel in aid of racketeering , see 18 U.S.C. § 1952; the two Saccoccios and Cirella were likewise convicted of structuring violations under 31 U.S.C. § 5324(a)(30); and Anthony DeMarco was convicted of filing false currency transaction reports in violation of 31 U.S>C> § 5324(a)(2).

Nevertheless, we are left with no shortage of food for thought. Appellant was served up a bouillabaisse of other offerings. We address his meatier propositions below, including three "incorporated" contentions that arguably have been preserved. And although we do not deem detailed discussion desirable, the record should reflect that we have masticated appellant's remaining points and found them indigestible.

II. EXTRADITION

As a threshold matter, appellant maintains that his trial and ensuing conviction violated the extradition treaty between the United States and Switzerland, and, in the bargain, transgressed the principles of dual criminality and specialty. We rejected these importunings.

---

[4] The five waived asseverations comprise: (1) whether the CTR charges, and the evidence engendered thereby, violated the Fifth Amendment privilege against self-incrimination; (2) whether the district court's jury instructions overlooked the teachings of Reves v. Ernst & Young, --U.S.--, 113 S.Ct. 1163, 122 L.Ed.2d. 525 (1993); (3) whether the court erred in instructing the jury that coconspirators' knowledge could be established by evidence of willful blindness; (4) whether the court erred in determining the scope of the charged conspiracy; and (5) whether the value of the washed funds as calculated for sentencing purposes improperly included revenue that the government conceded was legitimate in origin. In all events, none of these contentions appears to have much bite.

A. Gaining Perspective.

Further facts are needed to place appellant's extradition-related claims into a workable perspective. On November 18, 1991, a federal grand jury returned the indictment that inaugurated this prosecution. Count 1 charged appellant, his wife, and eleven associates with RICO conspiracy. See 18 U.S.C. § 1962(d) (1988). A RICO conspiracy, of course, requires the government to prove, inter alia, an illicit agreement to conduct a pattern of racketeering activity. See United States v. Ruiz, 905 F.2d. 499, 503 (1st Cir.1990); see also 18 U.S.C. § 1962(c) (1988). Proof of a pattern demands that the prosecution show "at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (1988). These acts, which must themselves comprise violations of specified criminal statutes, see id. § 1961(1)(B), are commonly referred to as "predicates" or "predicate acts." See, e.g., Ruiz, 905 F.2d. at 503.

In the instant indictment, the alleged racketeering activity comprised, among other specified predicate acts, incidents of money laundering, see 18 U.S.C. § 1956, 1957 CTR violations, see 31 U.S.C. § 5324(a)(1)-(3), and using travel and facilities in interstate commerce to promote these money laundering ventures, see 18 U.S.C. § 1952(a)(3). The grand jury also averred that the RICO conspiracy had been accomplished by means that included failing to file the necessary CTRs for cash transactions over $10,000. Counts 2-53 of the indictment charged appellant and others with failing to file CTRs in specific instances, see 31 U.S.C. §5324(a)(1); counts 54-68 charged appellant with illegally structuring monetary transactions in order to avoid the CTR reporting requirements, see id. §5324(a)(3); counts 69-129 charged appellant and his wife with the use of property derived from unlawful activities while engaging in monetary transactions affecting interstate commerce, see 18 U.S.C. § 1956; counts 130-142 charged appellant and his wife with money laundering in violation of 18 U.S.C. § 1956(a)(2); and counts 143-150 charged appellant and others with Travel Act violations under 18 U.S.C. § 1952(a)(3). The indictment also contained forfeiture allegations under the applicable RICO and money laundering statutes. See 18 U.S.C. §§ 982, 1963.

Six days after the grand jury returned the indictment, Swiss authorities arrested the Saccoccias in Geneva. They contested extradition on counts 1 through 68, and counts 143 through 150. On June 11, 1992, the Swiss Federal Tribunal (SFT) granted extradition on all charges except those contained in counts 2 through 68. The SFT reasoned that these 67 counts constituted nonextraditable offenses because Swiss law did not prohibit the underlying conduct. The SFT's discussion did not specifically mention the forfeiture allegations.

The Swiss surrendered appellant to the United States. He was transported to Rhode Island and arraigned on July 15. One week later, the jury returned a superseding indictment.[5] On July 30, the Justice Department, in the person of Michael O'Hare, wrote to Tania Cavassini, a Swiss official, enclosing a copy of the superseding indictment and inquiring whether it required a waiver of the rule of specialty.

On December 1, 1992, apparently in response to an inquiry from Cavassini, O'Hare transmitted a written assurance that, although the court papers still formally listed appellant as a defendant in respect to the CTR counts (for which extradition had been denied), the prosecution did not intend to press those counts. O'Hare explained that the prosecutor would offer no evidence of appellant's guilt on those charges with the result that "American law [will require] the judge to direct the jury to find the defendant not guilty." The following day, Cavassini advised that, under a final decision dated November 20, 1992, the SFT had "granted extradition of [appellant] for the facts enclosed in the Count Nr. 1 of the Superseding Indictment." Cavassini also indicated that appellant's local counsel in Geneva agreed with the SFT's decision and had scotched any possibility of a further appeal.

---

[5] The charges laid against appellant in the superseding indictment closely paralleled those contained in the original bill. Specifically, the grand jury accused appellant of RICO conspiracy (count 1), failure to file CTRs (counts 2-9), filing false CTRs (counts 10-22), unlawfully structuring monetary transactions to evade filing requirements (counts 23-37), engaging in monetary transactions using property derived from illegal activities (counts 38-98), money laundering (counts 121-33), and interstate travel in aid of racketeering (counts 134-41). Like the original indictment, the superseding indictment alleged violations of CTR requirements as predicate offenses for the RICO conspiracy and Travel Act counts, and reiterated the forfeiture allegations. However, the superseding indictment did include several counts not directed at appellant (counts 99-120).

On February 2, 1993, before the start of the trial with which we are concerned, the government moved to dismiss those counts of the superseding indictment (counts 2-37) that charged appellant with CTR offenses. The district court complied. The matter resurfaced in a slightly different shape ten days later when appellant's Swiss lawyer, Paul Gullu-Hart, wrote to Cavassini expressing concern that appellant's impending prosecution on charges with CTR violations were embedded as predicates for other offenses would insult the rule of specialty. On March 2, Gully-Hart wrote again, this time enclosing a copy of the prosecution's opening statement to the petit jury. Cavassini forwarded both of these letters to O'Hare. On March 8, Cavassini spoke with O'Hare and voiced her concern that appellant might be convicted under count 1 solely on the basis of CTR offenses.

The next day, Assistant United States Attorney James Leavey, a member of the prosecution team, advised Judge Torres that he had spoken with O'Hare. Without conceding the legal validity of Gully-Hart's point, Leavey asked the court to instruct the jury that CTR violations could not serve as predicates for purposes of either the RICO of Travel Act accounts. When the court acquiesced, the government submitted a redacted indictment that deleted all references to CTR offenses from the RICO and Travel Act counts. Appellant nonetheless moved for a mistrial, invoking the rules of dual criminality and specialty.

The District court denied the motion, explaining that it had agreed to the government's proposal purely as an accommodation. In the judge's view, the precautions were not legally required because the SFT had been pellucid in authorizing prosecution on the RICO count even though the claimed CTR violations were prominently displayed therein as potential predicates. The judge noted, moreover, that the evidence of appellant's CTR violation was in all events inadmissible in connection with the substantive money laundering counts (as to which extradition had been approved). Appellant resurrected the issue in his motion for a new trial following the adverse jury verdict. The court stood firm.

B. Dual Criminality and Specialty.

Although the principles of dual criminality and specialty are closely allied, they are not coterminous. We elaborate below.

1. Dual Criminality. The principle of dual criminality dictates that, as a general rule, an extraditable offense must be a serious crime (rather than a mere peccadillo) punishable under the criminal laws of both the surrendering and the requesting state. See Brauch v. Raiche, 618 F.2d. 843, 847 (1st Cir.1980). The current extradition treaty between the United States and Switzerland embodies this concept. See Treaty of Extradition, May 14, 1900, U.S.-Switz., Art. II, 31 Stat. 1928, 1929-30 (Treaty).

The principle of dual criminality does not demand that the laws of the surrendering and requesting states be carbon copies of one another. Thus, dual criminality will not be defeated by differences in the instrumentalities or in the stated purposes of the two nations' laws. See Peters v. Egnor, 888 F.2d. 713, 719 (10th Cir.1989). By the same token, the counterpart crimes need not have identical elements. See Matter of Extradition of Russell, 789 F.2d. 801, 803 (9th Cir.1986). Instead, dual criminality is deemed to be satisfied when the two countries' laws are substantially analogous. See Peters, 888 F.2d. at 719; Brauch, 618 F.2d. at 851. Moreover, in mulling dual criminality concerns, courts are duty bound to defer to a surrendering sovereign's reasonable determination that the offense in question is extraditable. See Casey v. Department of State, 980 F.2d. 1472, 1477 (D.C.Cir.1992) (observing that an American court must give great deference to a foreign court's determination in extradition proceedings); United States v. Van Cauwenberghe, 827 F.2d. 424, 429 (9th Cir.1987) (similar), cert. denied, 484 U.S. 1042, 108 S.Ct. 773, 89 L.Ed.2d. 859 (1988).

Mechanically, then, the inquiry into dual criminality requires courts to compare the law of the surrendering state that purports to criminalize the charged conduct with the law of the requesting state that purports to accomplish the same result. If the same conduct is object of criminal sanctions in both jurisdictions, no more is exigible. See United States v. Levy, 905 F.2d.326, 328 (10th Cir.1990) cert. denied, 498 U.S. 1049, 111 S.Ct. 759, 112 L.Ed.2d 778 (1991), see also Collins v. Loisel, 259 U.S. 309, 312,42 S.Ct. 469, 471, 66 L.Ed. 956 (1922) ("It is enough [to satisfy the requirement of dual criminality] if the particular act charged is criminal in both jurisdictions.")

2. **Specialty.** The principle of specialty - a corollary to the principle of dual criminality, see United States v. Herbage, 850 F.2d 1463, 1465 (11th Cir.1988), cert. denied, 489 U.S. 1027, 109 S.Ct. 1158, 103 L.Ed.2d 217 (1989) - generally requires that an extradited defendant be tried for the crimes on which extradition has been granted, and none other. See Van Cauwenberghe, 827 F.2d at 428; Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir.) cert. denied, 479 U.S. 882, 107 S.Ct. 271, 93 L.Ed.2d 247 (1986). The extradition treaty in force between the United States and Switzerland embodies this concept, providing that an individual may not be "prosecuted or punished for any offense committed before the demand for extradition, other than that for which the extradition is granted..." Treaty, Art. IX.

Enforcement of the principle of specialty is founded primarily on international comity. See United States v. Thirion, 813 F.2d 146, 151 (8th Cir.1987). The requesting state must "live up to whatever promises it made in order to obtain extradition" because preservation of the institution of extradition requires the continuing cooperation of the surrendering state. United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (per curiam), cert.denied, 479 U.S. 1009, 107 S.Ct. 652, 93 L.Ed.2d 707 (1986). Since the doctrine is grounded in international comity rather than in some right of the defendant, the principle of specialty may be waived by the asylum state. See id.

Specialty, like dual criminality, is not a hidebound dogma, but must be applied in a practical, common sense fashion. Thus, obeisance to the principle of specialty does not require that a defendant be prosecuted only under the precise indictment that prompted his extradition, see United States v. Andonian, 29 F.3d 1432, 1435-36 (9th Cir.1994), cert. denied,-- U.S. --, 115 S.Ct. 938, 130 L.Ed.2d 883 (1995), or that the prosecution always be limited to specific offenses enumerated in the surrendering state's extradition order, see Levy, 905 F.2d at 329 (concluding that a Hong Kong court intend to extradite defendant to face a continuing criminal enterprise charge despite the court's failure specifically to mention that charge in the deportation order). In the same vein, the principle of specialty does not impose any limitation on the particulars of the charges lodged by the requesting nation, nor does it demand departure from the forum's existing rules of practice (such as rules of pleading, evidence or procedure). See United States v. Alvarez-Moreno, 874 F.2d 1402, 1414 (11th Cir.1989), cert. denied, 494 U.S. 1032, 110 S.Ct. 1484, 108 L.Ed.2d 620 (1990); Thirion, 813 F.2d at 153; Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir.1985), cert. denied, 475 U.S. 1016, 106 S.Ct. 1198, 89 L.Ed.2d 312 (1986).

In the last analysis, then, the inquiry into specialty boils down to whether, under the circumstances, the court in the requesting state reasonably believes that prosecuting the defendant on particular charges contradicts the surrendering state's manifested intentions, or, phrased another way, whether the surrendering state would deem the conduct for which the requesting state actually prosecutes the defendant as interconnected with (as opposed to independent from) the acts for which he was extradited. See Andonian, 29 F.3d at 1435; United States v Cuevas, 847 F.2d 1417, 1427-28 (9th Cir. 1988), cert. denied, 489 U.S. 1012, 109 S.Ct. 1122, 103 L.Ed.2d

185 (1989); United States v. Paroutian, 299 F.2d 486, 490-91 (2d Cir.1962).

C. **Applying the Principles.** A district court's interpretation of the principles of dual criminality and specialty traditionally involves a question of law and is, therefore, subject to plenary review in the court of appeals. See Andonian, 29 F.3d at 1434; United States v. Khan, 993 F.2d 1368, 1372 (9th Cir. 1993), United States v. Abello-Silva, 948 F.2d 1168, 1173 (10th Cir. 1991), cert. denied, --U.S.--, 113 S.Ct. 107, 121 L.Ed.2d 65 (1992). Marching beneath this banner, appellant urges that his conviction must be set aside for three related reasons.[6] None has merit.

1. **Predicate Acts.** Appellant's flagship contention rests on the postulate that an offense which is itself nonextraditable cannot serve as a predicate act in connection with other, extraditable offenses; and that, therefore, the government's use of nonextraditable CTR offenses as predicate acts for purposes of the RICO and Travel Act counts crossed the line into forbidden territory. Even if we assume, however, that in some situations reliance on nonextraditable offenses as predicate for

---

[6] There is some dispute whether alleged violations of the principle of specialty can be raised by a criminal defendant. See, e.g., Demjanjuk, 776 F.2d at 583-84 (questioning whether the person being extradited "has standing to assert the principle of specialty"); Kaiser v. Rutherford, 827 F.Supp. 832. 835 (D.D.C.1993) (asserting that "[t]he rule of specialty is not a right of the accused but is a privilege of the asylum state and therefore [the defendant]has no standing to raise this issue") (internal quotation marks omitted). We need not probe the matter of standing for three reasons. First, while we take no view of the issue, we realize that there are two sides to the story, and the side that favors individual standing has much to commend it. See, e.g., United States v. Rauscher, 119 U.S. 407, 422-24, 7 S.Ct. 234-43, 30 L.Ed. 425 (1886) referring to specialty as a "right conferred upon persons brought from a foreign country" via extradition proceedings); Thirion, 813 F.2d at 151 & n. 5 (to like effect); see also United States v. Alvarez-Machain, 504 U.S. 655, 659-60, 112 S.Ct. 2188, 2191-92, 119 L.Ed.2d 441 (1992) (suggesting the continuing vitality of the Rauscher decision). Second, the government has advised us that, for policy reasons, it does not challenge appellant's standing in this instance. Third, appellant's asseverations are more easily dismissed on the merits. See Norton v. Mathews, 427 U.S. 524, 532, 96 S.Ct. 2771, 2775, 49 L.Ed.2d 672 (1976) (explaining that jurisdictional questions may be bypassed when a ruling on the merits will achieve the same result).

others, extraditable offenses might run afoul of dual criminality or specialty principles, the circumstances of this case present no such problem.

In general, we do not believe that there can be a violation of the principle of specialty where the requesting nation prosecutes the returned fugitive for the exact crimes on which the surrendering nation granted extradition. So it is here: the SFT twice approved appellant's extradition on counts that prominently featured CTR offenses as predicates. This approval -- to which we must pay the substantial deference that is due to a surrendering court's resolution of questions pertaining to extraditability, see, e.g., Casey, 980 F.2d at 1477 -- strongly suggests that the RICO and Travel Act counts, despite their mention of predicates which, standing alone, would not support extradition, are compatible with the criminal laws of both jurisdictions. Though a Swiss official may informally have fretted about the prospect of a RICO or Travel Act conviction based on nonextraditable predicates, we are reluctant to conclude on this gossamer showing that the SFT did not know and appreciate the clearly expressed contents of the indictment when it sanctioned extradition.

To clinch matters, the prosecution avoided any potential intrusion on the principles of either dual criminality or specialty by taking a series of prophylactic actions at trial. The fourth redacted indictment removed all references to CTR offenses from the compendium of charges pressed against the appellant. The judge then reinforced this fumigation of the indictment by advising the jurors that they should not concern themselves with whether appellant had committed any CTR offenses.[7] These precautions purged any taint, and knocked the legs out from under the line of reasoning that appellant seeks to pursue.

2. **Keeping Faith.** Next, appellant asserts that the government infringed on the principle of specialty by breaking its promise to the Swiss government and introducing evidence of CTR violations at appellant's trial. Abstractly, we agree with the core element of appellant's premise: the principle of specialty requires the requesting state to abide by the promises it makes to the surrendering state in the process of procuring extradition. See Najohn, 785 F.2d at 1422. But, concretely, we are unable to discern any breach of faith in this instance. Thus we resist the conclusion that appellant would foist upon us.

To buttress the claim that the United States did not keep its word, appellant avers that O'Hare's facsimile transmission, sent on December 1, 1992, was the functional equivalent of an assurance that the prosecutor would not present any evidence to the jury regarding Saccoccia's noncompliance with CTR requirements. Fairly read, the document -- despite its iteration that the prosecutor "would present no evidence regarding [Saccoccia's] guilt ... on the charges for which extradition was not granted -- does not support appellant's construction. O'Hare sent the transmittal in response to Cavassini's expression of concern that appellant might be convicted of charges for which extradition had been denied. His reply, taken in context, see supra p.675, amounted to no more than an assurance against that possibility. To read a promise not to introduce any evidence relevant to CTR violations into O'Hare's statement would necessitate wresting it from its contextual moorings and unreasonably stretching its literal meaning. We decline appellant's invitation to indulge in such phantasmagoric wordplay.[8]

---

[7] The judge instructed the jury:

You have heard references during this trial to currency transaction reporting requirements and I should make it clear that you are not being called upon to determine whether the defendant violated or conspired to violate any of those requirements. Therefore, you may consider evidence regarding the nature of currency transactions with banks to the extent that such evidence, in your view, may bear on the source of the money involved and/or the purposes for which the money may have been transferred or transported. But in reaching your verdict, you may not consider whether any such transactions were or were not consistent with transaction reporting requirements because... as I have just said, that is not an issue in this case...

3. The Claimed "Prosecution." Appellant's third contention is that the government violated the principle of specialty because it prosecuted him for CTR offenses. Since the nonextraditable CTR counts, as they pertained to appellant, were dismissed before the second trial began, his claim is founded on no more than the fact that his name appeared on the indictment during the first trial. While this may literally be "prosecution,"it is prosecution in name only -- and we will not carry hollow formalism to a point at which it engulfs common sense. Consequently, we hold that the mere existence of an unredacted indictment, under the circumstances of this case, is no reason to invalidate Saccoccia's conviction. Cf. Tacket v. Delco Remy Div. of Gen. Motors Corp., 937 F.2d 1201, 1202 (7th Cir.1991) (Bauer, C.J.) (quoting doggerel to the effect that "[s]ticks and stones may break your bones, but names can never hurt you").

---

[8] Of course, appellant had already been extradited and the Swiss authorities had already approved the superseding indictment before this supposed promise was made. This places a further obstacle in appellant's path: it strikes us as problematic whether the breach of a promise made after the defendant has been extradited, without more, furnishes a basis for reversing an ensuing conviction. In such circumstances, the surrendering state, by definition, has not relied on the requesting state's promise in deciding to return the defendant.

This leaves appellant's argument that he was illegally "prosecuted" because CTR offenses were included as predicate acts for purposes of the RICO and Travel Act counts until the fourth redacted indictment surfaced. As we have already observed, however, it would have been perfectly proper for the government to seek convictions on those counts based on CTR predicates. Hence, appellant's argument is without merit.[9]

For these reasons, we find appellant's conviction free from taint under the applicable extradition laws.

---

[9] If more is needed -- and we do not believe that it is -- the evidence of CTR violations, by and large, was independently admissible to support various aspects of the money laundering charges and other substantive counts for which extradition was explicitly approved.

III. THE COVETED CONTINUANCE

Appellant contends that the district court arbitrarily refused him a lengthy continuance prior to the start of the second trial,[10] leaving him with insufficient preparation time. Our analysis of the record indicates that the court acted within its discretion in scotching appellant's request.

A. Setting the Stage.

At arraignment, two attorneys, Jack Hill and Brian Ada, entered appearances as appellant's counsel. Soon thereafter, Austrian authorities arrested Hill for money laundering. Hill languished in prison from August through November of 1992. During that interval, he could not communicate with, or effectively assist, Saccoccia. Ada, who had originally been enlisted as local counsel, stepped into the breach and acted as lead counsel. Shortly after the first trial began, Ada became ill. The court granted appellant's motion for a mistrial and ordered a severance. The case proceeded to verdict vis-a-vis the other defendants. See supra note 3.

Naturally, the severance required a separate trial for appellant. The district court proposed to start in early February of 1993. Within a matter of days after the court announced the schedule, Hill, recently released from an Austrian prison, and Kenneth O'Donnell, a prominent Rhode Island defense lawyer, entered appearances as appellant's counsel. On December 10, 1992, appellant signed an extensive waiver of the potential conflict of interest posed by Hill's representation of him at a time when Hill himself faced charges of money laundering arising out of activities undertaken in conjunction with appellant.

---

[10] Appellant does not assign error to the denial of the continuances that he sought before the first (aborted) trial. See supra note 2.

On the same day, the court held a hearing anent the waiver. Among other things, appellant requested that his trial be rescheduled to April of 1993 so that his defense team could have more time to prepare. He claimed this extra time was necessary to review financial documents, study surveillance tapes, glean exculpatory evidence, and analyze inconsistencies in the statements of government witnesses. The court granted only a two-week extension, from February 3 to February 17, noting that the original indictment had been returned in 1991 and that counsel already had enjoyed a considerable period for preparation. Subsequent requests for continuances were also denied.

B. Applicable Legal Principles.

Trial management is peculiarly within the ken of the district court.[11] That court has great latitude in managing its docket, including broad discretion to grant or withhold continuances. Only an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" constitutes an abuse of that discretion. Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616-17, 75 L.Ed.2d 610 (1983) (internal quotation marks omitted); see also United States v. Devin, 918 F.2d 280, 291 (1st Cir.1990) (explaining that an appellate court must "show great deference" to district court decisions of this nature, and should overturn such decisions "only for a manifest abuse of discretion"). For present purposes, this means that the decision below must endure unless the party who moved for the continuance can demonstrate that, in withholding relief, the trial court indulged a serious error of law or suffered a meaningful lapse of judgment, resulting in substantial prejudice to the movant.[12] See, e.g., United States v. Saget, 991 F.2d 702,

---

[11] As we wrote on an earlier occasion:

> There is an important public interest in the efficient operation of the judicial system and in the orderly management of crowded dockets... The district judge is at the helm, sensitive to the tides that ebb and flow during a prolonged trial and knowledgeable about systemic demands. He is, therefore, the person best equipped to balance the competing considerations.

United States v. Devin, 918 F.2d 280, 291 (1st Cir.1990).

[12] The Seventh Circuit has gone so far as to term trial court decisions denying continuances "virtually unreviewable." United States v. Stevenson, 6 F.3d 1262, 1265 (7th Cir.1993) (internal

708 (11th Cir.) cert. denied, --U.S. --, 114 S.Ct. 396, 126 L.Ed.2d 344 (1993); United States v. Dennis, 843 F.2d 652, 653 n. 1 (2d Cir.1988).

For the purpose of determining whether a denial of a continuance constitutes an abuse of discretion, each case is sui generis. See United States v. Torres, 793 F.2d 436, 440 (1st Cir.), cert. denied, 479 U.S. 889, 107 S.Ct. 287, 93 L.Ed.2d 262 (1986). A reviewing court must look first at the reasons contemporaneously presented in support of the request for the continuance. See United States v. Lussier, 929 F.2d 25, 18 (1st Cir.1991). Other relevant factors may include such things as the amount of time needed for effective preparation, the amount of time needed for effective preparation, the amount of time actually available for preparation, the amount of time previously available for preparation and how assiduously the movant used that time, the extent to which the movant has contributed to his perceived predicament, the complexity of the case, the availability of assistance from other sources, the probable utility of a continuance, the extent of inconvenience to others (such as the court, the witnesses, and the opposing party) should a continuance ensue, and the likelihood of injustice of unfair prejudice attributable to the denial of a continuance. See United

---

quotation marks omitted). We think this description heads in the right direction but goes too far. See, e.g., United States v. Soldevila-Lopez, 17 F.3d 480, 490 (1st Cir.1994) (reversing district court's refusal to grant a continuance on the ground that newly emergent evidence justified more time); Delaney v. United States, 199 F.2d 107, 115 (1st Cir.1952) (finding that nationwide publicity had created a hostile atmosphere, and that, therefore, the district court should have granted a continuance).

States v. Soldevila-Lopez, 17 F.3d 480, 488 (1st Cir.1994); Lussier, 929 F.2d at 28; United States v. Zannino, 895 F.2d 1, 13-14 (1st Cir.), cert denied, 494 U.S. 1082, 110 S.Ct.1814, 108 L.Ed.2d 944 (1990).

C. **Analysis.**

Here, balancing the relevant considerations leaves us confident that the circumstances justified the refusal to grant a continuance. And, moreover, the record believes appellant's contention that the court's obduracy unfairly prejudiced his rights by leaving him insufficient time to prepare for trial. Appellant's most loudly bruited point is that the government produced 1600 hours of wiretap audio tapes, and that he had only 65 days, which he translates as equalling 1608 hours, to listen to them. Although his lament has some superficial plausibility, we agree with the district court that, notwithstanding the number of tapes, it was reasonable to expect defense counsel to be ready for trial in February. We explain briefly.

The grand jury indicted appellant in November of 1991. Thus, appellant's counsel, collectively, had far more than 67 days to work on the case. Moreover, the lawyers had the not inconsiderable benefit of a dress rehearsal, including unlimited access to the full record of the first trial (in which virtually the entire case against appellant was aired). O'Donnell, one of appellant's new attorneys, was especially familiar with the situation because he had presented a codefendant who had been acquitted in a separate trial. Furthermore, Hill and O'Donnell could -- and no doubt did -- confer with counsel for the codefendants and with Attorney Ada. In short, the means for efficacious preparation were tidily at hand.

Appellant's other assertions of supposed prejudice also lacked force. For example, his suggestion that a continuance might have enabled him to receive a complete transcript of Agent Shedd's conversation with Duenas overlooks the fact that the government provided him with the entire transcript. See infra Part IV(E). His claim that more time was needed to obtain a copy of a DEA report that he asserts would have bolstered the testimony of an expert witness overlooks the fact that the expert knew of the report and described its conclusions. See infra note 18. His claim that a continuance would have enabled him to obtain enhanced versions of two of the surveillance tapes before trial, see infra Part IV(F), is completely unpersuasive given his assertion that the enhanced tapes, when received, were "unclear" and "unintelligible." Appellant's brief at 36. And, finally, appellant's exhortation that a continuance would have allowed him to investigate whether the laundered cash represented gambling proceeds, as opposed to drug money, is unaccompanied by any colorable basis for assuming that his supposition was anything more than the most remote of possibilities.

In a nutshell, appellant has not made a sufficient showing of undue prejudice to warrant us in second-guessing either the district court's resolve to start the trial in mid-February of 1993 or its decision to grant appellant a far more modest delay than he requested. Since the record reflects no pressing need for an extended continuance, and likewise fails to demonstrate significant harm flowing from the lack of one, the denial of the motion for a continuance cannot be said to have substantially impaired appellant's defense. See, e.g., Dennis, 843 F.2d at 653 n. 1. Thus, no cognizable error inheres.

D. Conflict of interest.

Repeatedly, appellant claims that the denial of a continuance saddled him with conflict-ridden counsel. This construct does not withstand scrutiny. To show an actual conflict of interest, a criminal defendant "must demonstrate that some plausible alternative defense strategy might have been pursued" and "that this alternative strategy was not pursued because of the attorney's other loyalties or interests." United States v. Garcia-Rosa, 876 F.2d 209, 231 (1st Cir.1989), cert. granted and judgment vacated on other grounds, 498 U.S. 954, 111 S.Ct. 377, 112 L.Ed.2d 391 (1990). Appellant cannot meet this standard.

Appellant sees the conflict of interest as centered in Hill's need to protect himself at his client's expense. Appellant supports this accusation by repeated reference to Hill's indictment in Austria on charges that he conspired with appellant to launder the fruits on unlawful activity -- but appellant does not suggest any way in which this alleged conflict of interest adversely affected Hill's representation of him at trial. What is more, appellant's claim that he was faced with an intolerable dilemma -- he could accept Hill as his counsel or proceed to trial with an attorney who was untutored in the case -- is flatly contradicted in the record.

Appellant insisted, time and again, despite the district court's painstaking explanation of his right to conflict-free counsel, that Hill was the advocate of his choosing.

Appellant told the court unequivocally that he understood the potential conflict, but desired Hill's services. And he adhered to his position notwithstanding the court's entreaty to reconsider and its advice that he would be "better off" with an attorney free of any ties to the situation.

Last -- but surely not least -- appellant executed a written waiver stating that, after "[h]aving been fully advised of the possible adverse consequences arising from the actual or potential conflicts, with which Hill is or may be encumbered, he "knowingly, voluntarily, intelligently and irrevocably [wishes] to waive any and all such actual or potential conflicts of interest for the purpose of retaining Hill as a counsel." When a defendant knowingly selects a course of action, fully cognizant of its perils, he cannot later repudiate it simply because his case curdles. In the circumstances at bar, it is neither unfair nor unjust to hold appellant to his words. Thus, the district court's determination that appellant had voluntarily and knowingly waived his right to conflict-free representation is unimpugnable. See Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, 98 S.Ct. 1173, 1178 n. 5, 55 L.Ed.2d 426 (1978) (stating that " a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests").

Appellant has another arrow in this quiver. He reasons that the court should have overlooked his waiver of conflict-free counsel because Hill's continued representation constituted an unwaivable constitutional transgression. To be sure, a few courts have found a per se Sixth Amendment violation "where trial counsel was implicated in the crime for which his client was on trial."

Soldevila-Lopez, 17 F.3d at 487 n. 4 (citing cases). But these cases tend to involve circumstances in which an attorney has reason to fear that a vigorous defense of the client might unearth proof of the attorney's criminality. See, e.g., United States v. Cancilla, 725 F.2d 867, 870 (2d Cir.1984). Although Hill formed the court, in the vaguest of generalities, that he feared being charged or called as a witness in appellant's case, he provided no substantiation of these assertions, nor was he able to explain how the hypothetical conflict would, at that time, affect his representation of the appellant. Therefore, the district court seems entirely justified in concluding that Hill's representation of appellant would not be hampered by a realistic foreboding that vigorous advocacy would uncover evidence of his own crimes. Cf William Shakespeare, Macbeth, Act I, sc. iii, 11. 133-34 (1605) (noting that "present fears are less than horrible imaginings").

The sockdolager is that, wholly apart from Hill's status, appellant was also represented at trial by another lawyer, O'Donnell, who had no conflict of interest.[13] In an effort to scale his rampart, appellant suggests that O'Donnell, too, had an actual conflict of interest arising out of his previous representation of a codefendant, Raymond Marotto. By December of 1992, however, Marotto, a bank employee charged with failing to file

---

[13] At the December 10, 1992 waiver hearing, O'Donnell told the court that he had been "independently retained by [appellant] to be local counsel and co-counsel." He assured the court that he would "independently advise [appellant] with respect to any matters that might be affected by any potential conflict of interest. Mr. Hill might have."

CTRs, had ben acquitted in a separate trial. Appellant's convoluted explanation of how O'Donnell's concluded representation of Marotto created a conflict of interest is difficult to follow. He seems to be saying, without any citation to the record, that Marotto (who was not called to testify at appellant's trial) could have been a material witness. We reject this unfounded speculation.

As O'Donnell himself pointed out, Marotto's case turned on whether he did -- or did not -- have a responsibility to file the CTRs. There is nothing in the record that suggests that Marotto had any knowledge that might have been useful in appellant's defense. We have routinely dismissed analogous conflict of interest claims, see e.g., Garcia-Rosa, 876 F.2d at 231 (so holding when defendant "provide[d] no substantiation" for his assertion that his counsel had a conflict of interest that manifested itself when he did not call as a witness a person whom he previously had represented), and we dismiss appellant's claim on the same basis. It is simply too flimsy.

E. The Mid-Trial Motion.

At he close of the government's case, appellant submitted a proffer in support of a renewed motion for a continuance. The proffer suggested a global conspiracy "between the Israeli intelligence services and the CIA," and asserted that he had witnesses who "would testify about such matters as the Israeli defense industry" and "[t]he method by which the building of Israeli religious is financed by the Hasidic Jews in the United States who engage in money laundering." Appellant claimed that his counsel needed time to investigate the matters described in the proffer.

The district court found the proffer to be "too vague and unsubstantiated to constitute a basis for granting a continuance" because its "conclusory allegations" offered no explanation as to its relevancy to the case. Moreover, the court found no evidence that diligent efforts had been made to assure availability of the testimony and documents in a proper time frame. Hence, the court determined that the proffer afforded an inadequate basis for the requested continuance.

We discern no abuse of discretion. While the proffer weaves a tale of intrigue worthy of an Oliver Stone screenplay, we are unable to distill sufficient relevance or likelihood or success from its sinister allegations to suggest that a continuance, if granted, would have proven successful.

IV. MONEY AND DRUGS.

In order to obtain a conviction on the money laundering counts, as charged in the superseding indictment, the government had the burden of proving that the laundered funds were derived from the narcotics trade. See 18 U.S.C. § 1956(a)(2). Appellant challenges both the admissibility and the sufficiency of the evidence introduced for this purpose. The challenge is unavailing.

A. Standard of Review.

A district court has considerable discretion when determining whether evidence is admissible. See United

States v. Paulino, 13 F.3d 20, 25 (1st Cir.1994); Zannino, 895 F.2d at 16-17; United States v. Nivica, 887 F.2d 1110, 1126 (1st Cir.1989), cert.denied, 494 U.S. 1005, 110 S.Ct. 1300, 108 L.Ed.2d 477 (1990). Where, as here, the court finds that evidence is relevant, Fed.R.Evid. 401, but the defendant nonetheless objects to it on the ground that its value is overborne by the potential mischief it may cause, Fed.R.Evid. 403, the trial court must "strike a balance between probative worth and likely prejudice." Zannino, 895 F.2d at 16-17. The district court is the primary arbiter of how these scales should be calibrated. On appeal, we will reverse its determination only if admitting the evidence constituted a palpable abuse of discretion. See United States v. De La Cruz, 902 F.2d 121, 124 (1st Cir.1989). This is a difficult row to hoe: "Only rarely -- and in extraordinarily compelling circumstances -- will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." Freeman v. Package Mach. Corp., 865 F.2d 1331, 1340 (1st Cir.1988).

When no contemporaneous objection appears of record, the complaining party's burden increases. In that situation, appellant's review is for "plain error." United States v. Sepulveda, 15 F.3d 1161, 1187 (1st Cir.1993), cert. denied, -U.S.-, 114 S.Ct. 2714, 129 L.Ed.2d 840 (1994); see also Fed.R.Crim.P. 52(b). When the plain error standard prevails, we reverse only if a miscue "so poisoned the well that the trial's outcome was likely affected." Sepulveda, 15 F.3d at 1188 (quoting United States v. Mejia-Lozano, 829 F.2d 268, 274 (1st Cir.1987).

A different standard of review takes center stage when a defendant challenges the sufficiency of the evidence supporting his conviction. In that connection, the inquiry turns on whether, "after assaying all the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational fact finder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." United States v. O'Brien, 14 F.3d 703, 706 (1st Cir.1994). In performing the requisite analysis, we do not assess the credibility of witnessers, see id., nor do we force the government to disprove every reasonable hypothesis of innocence, see United States v. Echeverri, 982 F.2d 675, 677 (1st Cir. 1993).

B. National Origin Evidence.

Appellant contends that the prosecution made unfair use of impermissibly suggestive innuendo and stereotypes about Colombians, thereby inviting reversal. Appellant's argument focuses on evidence adduced, or remarks made, at four different points during his trial. First, appellant accuses the government of eliciting testimony concerning the birthplaces of Escobar and Garcia (both of whom were born in Colombia), while not inquiring about any other individual's place of birth. Second, the court permitted Sharir to testify that appellant told him to be careful because he was dealing with Colombians, who would go after his family if they were crossed. Third, when Donald Semesky, an IRS agent, offered expert testimony as to the modus operandi of Colombian drug cartels, he mentioned, among other things, that two

Colombian cartels control the illegal importation of cocaine in to the United States, and that their narcotics trafficking generates much cash, necessitating money laundering. Fourth, the government's summation hammered these same points.

Due to the singular importance of keeping our criminal justice system on an even keel, respecting the rights of all persons, courts must not tolerate prosecutors' efforts gratuitously to inject issues like race and ethnicity into criminal trials. See McCleskey v. Kemp, 481 U.S. 279, 309 & n. 30, 107 S.Ct. 1756, 1777 & n. 30, 95 L.Ed.2d 262 (1987); United States v. Doe, 903 F.2d 16, 21 (D.C.Cir.1990). Emphasizing a person's national origin not only may raise concerns of relevancy, undue prejudice, and prosecutorial misconduct, but also may pose issues of constitutional dimension. See, e.g., United States v. Vue, 13 F.3d 1206, 1213 (8th Cir.1994); United States v. Rodriguez Cortes, 949 F.2d 532, 541 (1st Cir.1991).

This does not mean, however, that all evidence touching upon race or national origin automatically must be excluded. A trial involves a search for the truth, and, as such, it cannot be entirely antiseptic. The trick is to separate impermissible uses of highly charged evidence from those uses that are proper and permissible. See United States v. Alzanki, 54 F.3d 994, 1007-08 (1st Cir.1995); Doe, 903 F.2d at 25. Thus, while it has proven acceptable on occasion for a prosecutor to introduce evidence of oppressive Kuwaiti customs to buttress the reasonableness of the victim's professed belief, See Alzanki, 54 F.3d at 1008, or to make an "unembellished reference to race simply as a factor bolstering an eyewitness identification of the culprit," Doe, 903 F.2d

1278, 1285 (1st Cir.1993),[14] or to describe drugs as coming from Colombia to give the jury a complete view of the conspiracy's endeavors to import cocaine, see United States v. Ovale-Marquez, 36 F.3d 212, 220 (1st Cir.1994), cert. denied, --U.S.--115 S.Ct. 1322, 131 L.Ed.2d 202 (1995) aggressive prosecutors sometimes go too far. When that occurs, courts must act. We have, for instance, reversed convictions when, as in Rodriguez Cortes, the government's strategem blatantly invited the jury to find the defendant guilty by reason of his national origin. See Rodriguez Cortes, 949 F.2d at 541 (finding abuse of discretion in admission of defendant's Colombian identification card); see also Vue, 13 F.3d at 1212-13 (reversing conviction because district court admitted testimony tying defendant's ethnic group, the Hmong, to 95% of the local opium trade); Doe, 903 F.2d at 23-27 (reversing conviction due to admission of testimony on modus operandi of Jamaican drug gangs and prosecutor's inflammatory comments thereon).

In determining the property of evidence implicating ethnicity or national origin, context is critical. In the case at bar, all the evidence about Colombia, viewed in context, was properly admitted and used. By like token, the prosecutor's comments wee not beyond the pale.

---

[14] It is noteworthy that in Tajeddini the prosecutor made the challenged comment in an effort to rebut the defendant's protest that he could not have known that he was smuggling heroin because he did not try to hide the drugs in a secret compartment in his luggage. See 966 F.2d at 1285. In that respect, Tajeddini resembles United States v. Khan, 787 F.2d 28, 34 (2d Cir.1986) (finding defendant's claim that he lacked the wherewithal to be a major drug dealer properly rebutted by evidence about the modest price of heroin in Pakistan, the practice among Pakistani dealers of selling drugs on credit, and the tendency of all Pakistanis, regardless of wealth, to dress alike).

Appellant's first contention is factually incorrect. The prosecutor asked several witnesses other than Escobar and Garcia (e.g., Sharir and Slomovits) where they were born. Seen in this light, the casual questioning about the place of birth, not objected to at trial, cannot conceivably plunge to the plane of plain error.

Similarly, Sharir's testimony that Saccoccia told him to be wary because he was dealing with Colombians is highly probative on the issue that appellant's knowledge that the laundered funds were derived from illegal activities. Moreover, common sense suggests that drug traffickers are more likely than, say, Avon ladies, to harm the families of business associates if the deal sours. It is, therefore, a gross exaggeration to declare that the evidence had no purpose other than to suggest that Colombians are prone to violence.

Similarly, Agent Semeky's testimony was relevant and appropriate in several respects. First, it went a long way toward explaining the nature of money laundering and the basis for appellant's activities. This is a perfectly legitimate use of evidence. See Doe, 903 F.2d at 19 and n. 21 (citing cases). Even the testimony about the cartel's control over the American drug trade was relevant on the issue of whether the cash that appellant scrubbed clean was in fact derived from illegal activities. The evidence could support a jury's plausible, though circumstantial, inference of an illicit source of funds based on appellant's repeated wire transfers of millions of dollars in laundered money to a country that functions as the nerve center of the world's traffic in cocaine.

The only remotely problematic references to Colombia are those contained in the summation. For example, a prosecutor sated:

> [Agent Semesky] told you as an expert, something you probably already knew, that cocaine comes from Colombia. That it's run by cartels in Colombia. That they ship the money up here and it gets out into the streets. That's the reason for all these ten and twenty dollar bills. These are grams of coke...

Later on, after reminding the jurors that the case involved roughly $100,000,000 "generated on the streets of New York that is sent back to Colombia," a prosecutor posed a series of rhetorical questions:

> If we're not talking about cocaine, what are we talking about? Is it from coffee vendors? Is this money coming from people out in the streets selling Colombian coffee? Oh, I have had a good day today. Five hundred thousand dollars, unfortunately, it's all in twenty dollar bills. Think of the change they had to give. This is a case about Roberto Juri and Tulio Alzate and Fernando Duenas and Stephen Saccoccia, not Juan Valdez, ladies and gentlemen. The evidence in this case and the and the only reasonable inference you can draw is drug money.

Appellant did not interject a contemporaneous objection to any of these comments.[15]

---

[15] The closing argument also contained the following passage: [W]e are asking you to draw some outrageous innuendo that because people are Colombians, they are involved in cocaine. The Government simply is not suggesting that. What we are suggesting is based on the evidence, the cocaine comes from Colombia. Juan Carlos Garcia testified that he was born in

It strains credulity to suggest, as Saccoccia does, that the prosecution was arguing that only drugs and coffee come from Colombia. The remark about coffee vendors was obviously intended to show the unlikelihood that any legitimate business would generate the volume of cash that flowed though appellant's operation. The quip about Juan Valdez,[16] while an unnecessary aside, cannot be said to emphasize emotion over facts. See Doe, 903 F.2d at 25. Viewed as a whole, the prosecution's evidence and comments about Colombia provide no basis for disturbing the jury's verdict.

Before ending our elaboration we not, as an adscript, that appellant himself is not Colombian, but is of Italian ancestry. This mitigates one of the most serious dangers of evidence about a person's national origin: that the jury will believe the defendant is guilty because of

---

Colombia and Raoul Escobar testified that he was born in Colombia. This defendant went -- on two occasions he went to Colombia to discuss money-laundering with Tulio Alzate and Roberto Juri. Although we cannot tell whether the prosecutor misspoke or whether his remarks were mistranscribed, we believe that the first sentence contains an error. The overall meaning of the passage is clear in urging the jury not to make a prejudicial inference based solely on nationality.

[16] We take judicial notice that the fictional Juan Valdez is a prominent persona in coffee advertisements. See Fed.R.Evid. 201(b)(1); 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5105, at 489 (1977) (noting that facts are "generally known within the territorial jurisdiction of the trial court" include those which "exist in the unaided memory of the populace"). Clad in a serape and sombrero and accompanied by his faithful donkey, Valdez regularly appears in supermarkets and private kitchens to remind consumers of the virtues of Colombian coffee.

stereotyping. Appellant has not cited any case in which a court has reversed a conviction due to evidence touching upon a national origin not shared by the defendant. This is not to say that injustice and unfair prejudice may never result from a conviction based on improper use of evidence about the national origin of a defendant's friends or business associates. But, the ricochet effect of such evidence is likely to do less harm, on average, than the direct impact of evidence about the defendant's country of origin.

C. The Dog Show.

Appellant faults the district court for admitting evidence that Bosco von Schleudersitz (Bosco), a nine-year-old German shepherd trained to detect narcotics,[17] alerted to the presence of drugs in bundles of cash brought to local banks by appellant's henchmen. At trial, Bosco's handler, Sgt. Edward Conley, testified that he took Bosco to a bank in Cranston, Rhode Island on March 23, 1990. Bosco "searched " several areas of the bank, such as the vault and teller stations, and did not react. Conley then took Bosco to a room in which a bag containing $9,000 was located, and when he instructed Bosco to search for drugs, the dog "showed a strong, positive aggressive alert, shaking the bag, ripping it apart, grabbing the money in his mouth, and ripping the money." According to Conley, a similar search, with similar results, took place on April 20, 1990, at a different bank in

---

[17] The dog's original trainer, a former Luftwaffe pilot, named him after the German word for "ejection seat."

Johnston, Rhode Island. In each instance, the currency to which Bosco reacted had been brought to the bank by appellant's associates in order to purchase cashier's checks.

To meet this testimony, appellant called two experts who attacked the reliability of Bosco's response. One of these witnesses, Thomas Knott, testified that the manner in which Conley orchestrated the sniff tests did not properly control against the possibility of a false alert. The second expert, Dr. James Woodford, criticized the testing protocol because the sniff tests were not verified by chemical field tests. Woodford also testified as to the widespread contamination of the United States currency with illegal drugs and the tenuous nature of the link between a canine alert and a conclusion that particular currency derived from narcotics trafficking)"[I]f there were drugs on that money, it doesn't mean that it is drug money.").[18]

---

[18] Appellant criticizes the district court for prohibiting Dr. Woodford from testifying more fully about a Drug Enforcement Administration (DEA) report that found one-third of the bills in a random sample of currency to be contaminated by cocaine. See Jones v. DEA, 819 F.Supp. 698, 720 (M.D.Tenn.1993) (citing DEA report). This criticism is overblown. The Court permitted the witness to describe the report's conclusions and to indicate that he had relied on those findings. See Fed.R.Evid. 703 (authorizing reliance on facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions of inferences upon the subject"). The court's decision to preclude attribution of the report was well within its discretion. Moreover, because the report was available to appellant despite the government's alleged failure to disclose it in a timeous manner, the rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), does not profit appellant's cause. See Sepulveda, 15 F.3d at 1178 ("The lack of

Appellant insists that the probative value of dog sniff evidence is substantially outweighed by its prejudicial effect, and that the district court erred in refusing to exclude the evidence under Fed.R.Evid. 403. This claim deserves serious attention, for recent decisions about the evidentiary value of a trained dog's alert to currency are not uniform. Compare, e.g., United States v. U.S. Currency, $30,060.00, 39 F.3d 1039, 1041-43 (9th Cir.1994) (noting widespread contamination and concluding that "the probative value of a positive dog alert in currency forfeiture cases in Los Angeles is significantly diminished"); United States v. Carr, 25 F.3d 1194, 1215 (3d Cir.) (Becker, J., concurring in part that a "substantial portion of United States currency now in circulation is tainted with sufficient traces of controlled substances to cause a trained canine to alert"), cert. denied, --U.S.--, 115 S.Ct. 742, 130 L.Ed.2d 643 (1994); and Jones v. DEA, 819 F.Supp. 698, 721 (M.D.Tenn.1993) (suggesting that "continued reliance of courts and law enforcement officers on dog sniffs to separate 'legitimate' currency from 'drug-connected' currency is logically indefensible) with, e.g., United States v. $67,220.00 in U.S. Currency, 957 F.2d 280, 285-86 (6th Cir.1992) (noting that "a positive dog reaction [to currency] is at least strong evidence of a connection to drugs"); United States v. $215,300 U.S. Currency, 882 F.2d 417, 419 (9th Cir.1989) (upholding forfeiture based n part on a canine alert to currency), cert. denied, 497 U.S. 1005, 110 S.Ct. 3242, 111 L.Ed.2d 752 (1990); and United States v. Hernando Ospina, 798 F.2d

---

demonstrable prejudice sounds the death knell for a 'delayed discovery' claim."); Devin, 918 F.2d at 289 (similar).

1570, 1583 (11th Cir.1986) (finding canine sniff evidence to be both probative and helpful to the jury in concluding that laundered money constitutes drug proceeds).

In the end, we reject appellant's asseveration. We do not think that the district court, based on the information of record in this case, abused its discretion in admitting the canine sniff evidence.[19]

Even though widespread contamination of currency plainly lessens the impact of dog sniffing evidence, a trained dog's alert still retains some probative value. Ordinary experience suggests that currency used to purchase narcotics is more likely than other currency to have come into contact with drugs. Here, moreover, the evidence supports an inference that Bosco's frenzied reaction was caused by more than a mere trace of contamination.

The record contains corroboration of Bosco's olfactory evidence. Several witnesses testified that ordinary human senses could detect something unusual about the money that appellant's associates brought to the banks. One teller testified that he occasionally notices that the money felt "dusty.. almost floury from pizza dough, that type of feeling." Another teller reported that she noticed an odor or fragrance, akin to that of an orchid. This evidence, along with Conley's testimony that the dog did not react in other areas of the banks, buttressed the lower courts's belief that the dog's sniff evidence had probative force.

---

[19] Because appellant neither introduced nor proffered the materials discussed by other courts suggesting that a very high percentage of United States currency is contaminated with drug residue, see, e.g., Carr, 25 F.3d at 1215 n. 6 (reviewing estimates suggesting that between one-third and 97% of United States currency is drug-contaminated); United States v. $639,558 in U.S. Currency, 955 F.2d 712. 714 n. 2 (D.C.Cir.1992) (similar), those materials could not inform the district court's decision. Cf. Carr, 25 F.3d at 1202 n. 3 (declining to take judicial notice that nearly all currency contains detectable traces of illegal narcotics).

Conversely, though the dog sniff evidence likely bolstered the prosecution's case and served to inculpate the defendant. we are not convinced that it presented a substantial risk of unfair prejudice. See generally Rodriguez-Estrada, 877 F.2d at 156 ("By design, all evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided."). After all, the court allowed appellant to call two expert witnesses who debunked Bosco's reaction to the currency. If, on one hand, the jury disbelieved appellant's experts, it doubtless discounted the value of the canine alert. If, on the other hand, the jury disbelieved appellant's experts, it was entitled to place a greater value on the canine sniff. See, e.g., Quinones-Pacheco v. American Airlines, Inc., 979 F.2d 1,5 (1st Cir.1992) (explaining that "expert opinion testimony, even if not directly contradicted, is not ordinarily binding on a jury").

I any event, considering the high degree of deference we owe to a district court's balancing of probative value against unfairly prejudicial effects, see Rodriguez-Estrada, 877 F.2d at 156, we cannot say that the trial court abused its wide discretion in admitting the evidence of Bosco's reaction to the currency delivered by appellant's associates.

D. Testimony of Juan Carlos Garcia.

Juan Carlos Garcia, a participant in the money laundering activities, testified for the government at appellate's trial. Garcia said that in 1987, while living in the United States, he began working for his brother-in-law, Fernando Duenas. Following Duenas' orders, Garcia would respond when paged on his beeper, arrange to retrieve a quantity of cash, and deposit the money in one of several bank accounts maintained under the names of Duenas, Duenas' wife (Garcia's sister), or Duenas' brother. By the end of 1987 the cash had mushroomed from $10,000-$20,000 per shipment to $150,000-$200,000 per shipment.

Garcia met appellant for the first time in May of 1989. With Duenas' blessing, the two men arranged that appellant would accept bundles of cash from Garcia and send the money to Colombia. On countless occasions thereafter, appellant received money from Garcia and redirected it to accounts controlled by Duenas.

At trial, the district court permitted Garcia, over objection, to testify that, in 1988, Duenas told him that a man named "Caesar" would call and give him something other than money. Garcia knew Caesar because Caesar had brought money to him on a previous occasion. Caesar called and informed Garcia that he would be delivering a kilogram of cocaine. Subsequently, Caesar handed Garcia a shopping bag containing a block of a granular substance beige in color. Garcia tried to sell the merchandise, as directed by Duenas, but was unable to do so. He eventually delivered the package to another individual on Duenas' instructions.

Appellant assigns error to the trial court's admission of the testimony anent the package. The assignment error has twin foci: (1) the conversations between Duenas and Garcia, and (2) Caesar's assurance that the package contained cocaine.[20] We believe that the court lawfully admitted the evidence.

The Evidence Rules provide that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not considered hearsay. Fed.R.Evid. 801(d)(2)(E). Here, the first prong of the rule is satisfied. The record contains adequate evidence that Duenas, Garcia, and Caesar were involved in a single conspiracy to launder money. By joining that conspiracy at a later date, appellant effectively adopted coconspirator declarations previously made. See United States v. Murphy, 852 F.2d 1,8 (1st Cir.1988), cert. denied , 489 U.S. 1022, 109 S.Ct. 1145, 103 L.Ed.2d 205 (1989); see also United States v. Baines, 812 F.2d 41, 42 (1st Cir.1987) ("[A] conspiracy is like a train. When a party knowingly steps abroad, he is part of the crew, and assumes conspirator's responsibility for the existing freight -- or conduct -- regardless of whether he is aware of just what it is composed.").

The second prong of the rule is also satisfied; the statements were made during and in furtherance of the very conspiracy that appellant joined. For one thing, we have held that "when a number of people combine efforts to manufacture, distribute and retail narcotics, there is a single conspiracy, a 'chain conspiracy', despite the fact that some of the individuals linking the conspiracy together have not been in direct contact with others in the chain." United States v. Rivera-Santiago, 872 F.2d 1073, 1080 (1st Cir.), cert. denied, 492 U.S. 910, 109 S.Ct. 3227, 106 L.Ed.2d 576 (1989). For another thing, money laundering and narcotics trafficking are symbiotic activities, each of which may require the other in order to continue. Duenas' efforts to have Garcia sell the cocaine for him and the group's ongoing campaign to launder money can rationally be seen as adjacent links in the lengthy chain that binds up the narcotics trafficking cycle. Thus, the district court acted within its proper province in deeming both activities part of the same conspiracy, and in holding that the attempted narcotics sale was in furtherance of it. Consequently, the challenged statements were properly admitted under Rule 801(d)(2)(E).

---

[20] The court gave limiting instructions referable to this evidence, telling the jury that could only be considered on the issue of whether the money appellant laundered was in fact the proceeds of narcotics trafficking.

We note, moreover, as did the district court, that a statement made by an unavailable declarant[21] falls outside the hearsay exclusion if the statement "st the time of its making ... so far tended to subject the declarant to civil or criminal liability ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed.R.Evid. 804(b)(3). Duenas' and Caesar's statements to Garcia were tantamount to admissions that they were dealing cocaine. Because such statements were against the declarants' penal interest, they came within the encincture of Rule 804(b)(3) and were admissible on that basis.

---

[21] The district court made an explicit, warrantable finding that Duenas was unavailable for trial. Caesar, whose last name is unknown, apparently has disappeared into thin air.

Finally, appellant's suggestion that the admission of Garcia's testimony abridged the Confrontation Clause is off base. It is well settled that a statement falling within a firmly rooted hearsay exception will not be held to violate the Confrontation Clause. See Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539 65 L.Ed.2d. 597 (1980); Puleio v. Vose, 830 F.2d. 1197, 1204-05 (1st Cir.1987), cert denied, 485 U.S. 990, 108 S.Ct. 1297, 99 L.Ed.2d. 506 (1988). It is equally well settled that the exceptions for coconspirator declarations and for declarations against penal interest are both firmly rooted in our jurisprudence. See Bourjaily v. United States, 483 U.S. 171, 183, 107 S.Ct. 2775, 2782-83, 97 L.Ed.2d. 144 (1987) (discussing coconspirator exception); United States v. Innamorati, 996 F.2d. 456, 474 n. 4 (1st Cir. 1993) (discussing declaration against interest exception), cert. denied, – U.S.–, 114 S.Ct. 1073, 127 L.Ed.2d. 391 (1994).

In the late 1980s, the DEA set up a network of sham corporations ostensibly to provide a money laundering service to underworld elements. DEA Special Agent James Shedd participated in this reverse string operation (dubbed "Operation Pisces"). Duenas dealt with the Pisces network in 1987 and 1988. At trial, a prosecutor suggested that Shedd would testify as follows: "Mr. Duenas told him that ninety-nine percent of the money that he was turning over to the undercover agent was, in fact, drug money." On the basis of this representation, the lower court denied a motion in limine by which the defense sought to exclude Shedd's testimony regarding Duenas' statements. Shedd told the jury about thirtyseven transactions in which Duenas supplied cash that the DEA undercover operation laundered for him. Shedd also described several conversations with Duenas in which Duenas reportedly said that he laundered money for Colombian drug traffickers and "that ninety-nine percent of the money that money-launderers deal in Bogota comes from narcotics proceeds."

During cross-examination, appellant's counsel challenged Shedd about this statement. Shedd and Duenas conversed in Spanish, and some of their conversations had been recorded. Defense counsel called Shedd's attention to one such conversation. The translation indicated that Duenas made the contested comment during a discussion in which he explained that, although it was against the law, foreign currency routinely circulated in Colombia. He apparently added: "Logically, the [foreign] currency that circulates the most over there ... is the dollar ... which ninety-nine percent of it comes from drug dealing." Shedd responded that his direct testimony had been premised not on a single discussion, but on an overall impression gained from a lengthy conversation with Duenas.[22] Appellant then moved to strike Shedd's testimony. Judge Torres denied the motion.

Appellant maintains that the district court made no fewer than four errors in connection with this testimony. First, appellant posits that Duenas' statements were barred by the hearsay rule. This claim fails. The court was warranted in finding that these were coconspirator declaration and, thus, admissible under Rule 801(d)(2)(E). See E.G., Sepulveda, 15 F.3d at 1180; Ortiz F.2d at 715-15.

---

[22] Shedd also offered the following syllogism: "Ninety-nine percent of the money, of the U.S. dollars that's is drug money. He's aa money launderer, then ninety-nine percent of the money that the launders comes from drug money."

Appellant's second contention is that Duenas' statement, in its true form, was irrelevant because it was nothing more than a gross generalization about the Colombian economy. We disagree. Though courts are sometimes cautious about admitting abstract data as cods of what actually happened in an individual case, a percentage like "ninety-nine percent" is quite powerful, and far surpasses the usual test that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Trial courts are afforded wide discretion in determining whether evidence clears this low threshold, see United States v. Tierney, 760 F.2d. 382, 387 (1st Cir.), cert denied, 474 U.S. 843, 106 S.Ct. 131 88 L.Ed.@d 108 (1985), and we will disturb an exercise of that discretion only if manifest abuse appears, see Sepulveda, 15 F.3d at 1194; United States v. Griffin, 818 F.2d 97, 101 (1st Cir.), cert denied, 484 U.S. 844, 108 S. Ct. 137, 98 L.Ed.2d 94 (1987).

Under this deferential standard, the district court acted within its lawful powers in deeming Duenas' statements relevant to the issue of whether the money appellant laundered was in fact derived from narcotics trafficking. Duenas' remark, even in the diluted form that was heralded on cross-examination, has at least some probative value in ascertaining whether the drug trade was the source of the funds that appellant washed, much as the fact that a lake is contaminated has some probative value in ascertaining whether a stream that feeds the lake is contaminated.

Appellant's third sally alleges error in Shedd's explanation that his initial testimony about Duenas' statement was based on an overall impression from several hours of conversation. Although a witness is generally not permitted to testify about his subjective interpretations of what has been said by another person, he may do so if his opinion is rationally based on his perception and is helpful either to an understanding of his testimony or to the determination of fact in issue. See United States v. Cox, 633 F.2d 871, 875 (9th Cir.1980), cert denied, 454 U.S. 844, 102 S.Ct. 159, 70 L.Ed.2d 130 (1981). In this case, we conclude that the district court acted lawfully in leaving the testimony intact.

Shedd tendered his explanation of Duenas' statement in direct response to a question by appellant's counsel on cross-examination. The answer was not followed by a timely objection or motion to strike. While appellant challenged Shedd's qualifications to offer an opinion about Duenas' state of mind in a subsequent motion to strike, this wa too late. See United States v. Moore, 923 F.2d 910, 915 (1st Cir.1991) (holding that Evidence Rule 103 requires that objections be made at the time evidence is offered); United States v. Parodi, 703 F.2d 768, 783 (4th Cir.1983) (same). The proper time to have registered an objection to Shedd's explanation was immediately after it was uttered. Accordingly any objection to the explanation has been waived. And. moreover, even if the court erred in permitting the answer to stand, it looms as harmless beyond all doubt in the context of a very efficacious cross-examination.

Appellant's final contention is that the prosecution knowingly offered Shedd's testimony despite having a transcript that refuted it, and, to make a bad situation worse, deliberately withheld the transcript from the defense. Having carefully examined the record, we find no valid reason to conclude that the prosecution intentionally mischaracterized Shedd's proposed testimony during the in limine hearing, and no hint of prosecutorial misconduct in the handling of the transcript. At any rate, it is perfectly clear that defense counsel obtained the unexpurgated transcript in ample time to conduct a very effective cross-examination on the following day. There was no prejudice and, hence, no reversible error. See Devin, 918 F.2d at 290.

F. The Wiretap Tapes.

The district court allowed the prosecution to introduce tape recordings of two conversations in which Saccoccia's employees made reference to drugs. The tapes are not entirely audible, and the parties disagree about what was said during two potentially significant conversations. The government asserts that, in a discussion that took place at Trend's offices, Kenneth Saccoccio referred to cash that he and Hurley were counting as "funkin' drug money." Appellant claims that this portion of the tape was inaudible. The other conversation took place at Saccoccia Coin Company. In it, Stanley Cirella spoke to Stephen Pizzo about an ongoing investigation of appellant's organization.

According to the government, Cirella declared that "he" - A pronoun that we take in contest to refer to Saccoccia - had told him that "they [the authorities] ain't doin' this [conducting the investigation] because of the coke, they're doin' this because of the washing of money." Appellant contends that Cirella said "gold" rather than "coke."

The issue on appeal is whether the district court abused its discretion in allowing the taped conversations to be presented to the jury in conjunction with the government's transcript. In appellant's view, the inaudible portions of the tapes are so critical as to make the rest more misleading than helpful. See United States v. Carbone, 798 F.@d 21, 24 (1st Cir.1986). Having listened to the tapes, see United States v. Carbone, 880 F.2d 1500, 1503 (1st Cir.1989), cert. denied, 493 U.S. 1078, 110 S.Ct. 1131, 107 L.Ed.2d 1037 (1990), we believe that they are reasonably audible and that the judge appropriately left their interpretation to the jury. What was or was not said during a tape-recorded conversation is ordinarily a question of fact, not a question of law.

Appellant's fallback position is that, even if the government accurately transcribed the tapes, the lower court erred in failing to tell the jury that any statements about the source of the laundered money were relevant only to the speakers' subjective beliefs. This position hinges on the premise that, in the absence of a concinnous foundation showing the speakers' knowledge, the comments cannot constitute proof vis-a-vis Stephen Saccoccia (who did not participate in the discourse) as to whether the money in fact emanated from drug transactions.

We disagree with appellant's premise for two reasons. First, Evidence Rule 104(b) provides that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." In addressing foundational issues, the trial judge acts as a gatekeeper, examining the evidence and deciding "whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence." Huddleston v. United States, 485 U.S. 681, 690, 108 S.Ct. 1496, 15010, 99 L.Ed.2d 771 (1988). The conditional fact may be based on "reasonable inference from the circumstantial evidence." Onujiogu v. United States, 817 F.2d 3, 5 (1st Cir.1987); See, e.g. Veranda Beach Club Ltd. Partnership v. Western Sur. Co., 936 F.2d 1364, 1372 (1st Cir.1991).

In light of the wide discretion afforded to trial judges in deciding whether an adequate foundation has been laid, see Real v. Hogan, 828 F.@d. 58, 64 (1st Cir.1987), we think that Judge Torres acted unexceptionably in determining that the jury could rationally infer that appellant's employees would not refer to the cash as "drug money" without some basis in fact. The men who made the statements were substantially involved in appellant's operation and could easily have had opportunities to learn of the money's origin.

As we have indicated, there is a second reason why appellant is mistaken insofar as he sees personal knowledge about the source of the funds as a prerequisite to general admissibility of the comments. Both statements were made by coconspirators an are thus admissible under Evidence Rule 801(d)(2)(E) without a showing of personal knowledge. See United States v. Goins, 11 F.3d 441, 443-44 (4th Cir.1993), cert. denied, - U.S. -, 114 S.Ct. 2107, 128 L.Ed.2d 668 (1994) (holding that the personal knowledge requirement of Evidence Rule 602 "does not apply to statements of a co-conspirator admissible as non-hearsay under Rule 801(d)(2)(E)"); cf. Brookover v. Mary Hitchcock Memorial Hosp., 893 F.2d. 411, 415-18 (1st Cir.1990) (Finding no requirement of personal knowledge for admission of a statement under Rule 801(d)(2)(D)).

For these two reasons the challenged statements were properly before the jury, and the court acted appropriately in refusing appellant's proposed limiting instruction.

G. The Sufficiency of the Evidence.

Viewing the evidence as a whole and keeping in mind that the prosecution;s burden of proof can be satisfied by either direct or circumstantial evidence, see O'Brien, 14 F.3d at 706, we conclude that a rational factfinder could determine beyond a reasonable doubt that the money appellant laundered was in fact derived from the narcotics trade.

Rehashing the evidence would serve no useful purpose. We do take special note, however, that appellant's money-washing operation matched Agent Semesky's description of how Colombian drug rings traditionally laundered ill-gotten gains, and that, as the district court observed, it is difficult to conceive of any non-narcotics-related business that could create a comparable cascade of creased currency. That the waves of cold case typically appeared in well-worn bills of small denomination makes the tie tighter. Then, too, the jury heard competent evidence that Duenas, who furnished money for appellant to launder, himself performed monetary ablutions for narcotics traffickers (and, on one occasion, supplied cocaine for an associate to sell). The canine alert to currency that appellant's associates had gathered furnished some added support for the theory that the money emanated from drug sales. Finally, appellant's own employees suggested on two occasions that the washed funds were linked to narcotics.

Taken in the ensemble, these pieces of evidence provide an adequate foundation on which the jury could build a finding that appellant laundered drug money. Jurors, after all, are not expected to resist common-sense inferences based on the realities of human experience. See Veranda Beach Club, 936 F.2d at 1372 ("The law is not so struthious as to compel a factfinder to ignore that which is perfectly obvious."); United States v. Ingraham, 832 F.2d 229, 240 (1st Cir.1987) (similar), cert. denied, 486 U.S. 1009, 108 S.Ct. 1738, 100 L.Ed.2d (1988).

V. FORFEITURE

The court bifurcated appellant's trial, separating the substantive criminal charges from the forfeiture claims. Appellant waived his right to trial by jury on the latter counts. All counsel assured the judge that they had no additional evidence to present at the second anticipated phase of the trial and, therefore, that the hearing on forfeiture would "be purely a matter of legal argument." Accordingly, the judge scheduled arguments for March 26, 1993.

On the assigned date, appellant was before a California court in connection with a separate action. His counsel objected to proceeding in appellant's absence. See Herring v. New York, 433 U.S. 853, 863-65, 95 S.Ct. 2550, 2556-57, 45 L.Ed.2d 593 (1975) (remarking a defendant's constitutional right to make a closing argument, even in a bench trial); Fed.R.Crim.P. 43(a) ("The defendant shall be present at ... every stage of the trial including ... the imposition of sentence.....:). Specifically, counsel stated that (1) he required appellant's assistance "in responding to whatever it is the government may say about the evidence as it relates to the law that's going to be argued," and (2) appellant might wish to exercise his right to make a closing statement. The court then offered to proceed on the understanding that appellant's counsel could make incremental arguments at the sentencing hearing, with appellant present.[23] When counsel persisted in his original position, the court terminated the session.

The disposition hearing was held on May 12, 1993. Appellant was present throughout. The district court determined that he should forfeit all the money laundered during the life on the conspiracy, and using bank records, fixed the amount at $136,344,231.86. See United States v. Saccoccia, 823 F.Supp. 994, 1006 (D.R.I.1993). At the government's urging, the court subsequently amended the forfeiture order to specify substitute assets for forfeiture.[24] See 18 U.S.C. § 1963(m) (1988).

---

[23] Noting that forfeiture is part of the sentencing process, and that Saccoccia would be present for sentencing, the court suggested to defense counsel that "to the extent the sentencing includes the potential for forfeiture order, you can be heard on that issue just as you would on any other sentencing issue at that time."

Appellant assigns error. He strives to persuade us, inter alia, that applicable extradition doctrines barred forfeiture; that the court ignored the strictures of due process; and that the forfeiture order swept too broadly. We are not convinced.

A. Extradition/Forfeiture.

Appellant asserts that the forfeiture entered against him violates the rule of specialty because it is tantamount to prosecution and conviction for an offense on which extradition was neither sought nor granted. He also suggests that the principle of dual criminality prohibits the forfeiture because Swiss law does not render a defendant criminally liable for forfeiture by reason of unlawful money transfers. These initiatives fail because they ignore the irresistible conclusion that, at least for present purposes, criminal forfeiture is a punishment, not a separate criminal offense.

---

[24] In discussing substitutions, Saccoccia seeks to incorporate by reference his codefendants' plaint that the court improperly allowed the government to add property subject to forfeiture while the cases were on appeal. We reject this remonstrance. This district court did not "amend" its judgement, but, rather, ordered forfeiture of substitute assets based on a supportable finding that appellant had transferred forfeited proceeds beyond the jurisdiction of the court. Contrary to appellant's intimation, this procedure did not insult his constitutional entitlement to due process, nor did it run afoul of the Double Jeopardy Clause.

We think that the genealogy of modern criminal forfeiture is important. The device is born out of the mating of two historically distinct traditions. One parent is civil for forfeiture, and in rem proceeding rooted in the notion that property used in, or intimately associated with, criminal activity acquires a taint, and that such property is therefore forfeitable even if not owned by the miscreant. See United States v. Sandini, 816 F.2d 869, 872 (3d Cir.1987). The second parent is old-hat criminal forfeiture, which traditionally operated as an incident of a felony conviction is personam against a convicted defendant, requiring him to forfeit his property to the crown. See United States v. Nicholas, 841 F.2d. 1485, 1486 (10th Cir.1988). The forfeiture provisions of RICO combine both traditions because they act in personam against the defendant, yet require a nexus between the forfeited property and the crime.[25] See id. at 1486-88 (reviewing historical aspects of forfeiture); Saccoccia, 823 F.Supp. at 1001.

Partially as a result of this mixed heritage, courts have struggled to categorize the resultant hybrid - modern criminal forfeiture - as either a punishment for, or an element of, a criminal offense. The majority view regards criminal forfeiture for narcotics offenses under 21 U.S.C.

---

[25] The district court imposed forfeiture pursuant to both a money laundering statute, see 18 U.S.C. § 982, and a RICO statute, see id. § 1963. Although there are some slight differences in the operation of the two statutes, see Saccoccia, 823 F.Supp. at 1001-05, these differences do not affect our analysis of the extradition issues. For simplicity's sake, we refer only to the RICO forfeiture statute. Nonetheless, our discussion is equally applicable to criminal forfeiture under the money laundering laws.

§ 853 as part of the punishment imposed on a defendant. See, e.g., United States v. Elgersma, 971 F.2d 690, 694 (11th Cir.1992) (holding that "criminal forfeiture is part of the sentencing process and not an element of the crime itself"); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1576-77 (9th Cir.1989) (similar), cert. denied, 497 U.S. 1003, 110 S.Ct. 3237, 111 L.Ed.2d 748 (1990): Sandini, 816 F.2d at 875 (similar). Other straws in the wind blow in the same direction. See e.g., Alexander v. United States, -- U.S. --, --, 113 S.Ct. 2766, 2772, 125 L.Ed.2d. 441 (1993) (characterizing a RICO forfeiture order against a pornography merchant as "a punishment for past criminal conduct"); United States v. Kingsley, 851 F.2d 16, 18 n. 2 (1st Cir.1988) (noting in dictum that "in personam criminal forfeiture ... is intended to directly punish persons convicted of a criminal offense by forcing them to forfeit the proceeds obtained as a result of that offense"). Withal, there remains some nagging doubt about whether forfeiture is strictly a punishment as opposed to a separate substantive charge. See e.g., Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617, 628 n. 5 S.Ct. 2646, 2654 n. 5, 105 L.Ed.2d 528 (1989) (stating in dictum that "forfeiture is a substantive charge in the indictment against a defendant"); Fed.R.Crim.P. 31(e) advisory committee's note (noting committee's assumption that "the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved").

We resolve that doubt favorably to the government to the extent necessary to rebut Saccoccia's claims. Thus, we hold that, for purposes of extradition law, forfeiture is neither a free-standing criminal offense nor an element of a racketeering offense under RICO, but is simply an incremental punishment for that proscribed conduct. Consequently, a defendant may be subjected to a forfeiture order even if extradition was not specifically granted in respect to the forfeiture allegations. We base this ruling primarily on three pillars: the weight of authority counsels in this direction; the punitive aspects of criminal forfeiture predominate (among other thins, RICO forfeiture retains the functional traits of a punishment since it is definitively imposed only after the defendant's guilt has otherwise been determined); and, finally, treating criminal forfeiture as a punishment in the extradition milieu is consistent with the emphasis that the doctrine of dual criminality places on the unlawfulness of the defendant's conduct, and, correspondingly, on the lack of any requirement that a crime have identical elements or penalties in the two jurisdictions, see Collins, 259 U.S. at 312, 42 S.Ct. at 470-71; Levy, 905 F.2d at 328.

It follows, therefore, that appellant was properly subjected to a criminal forfeiture order even if he was not extradited on forfeiture charges and even if Swiss law does not provide for criminal forfeiture under comparable circumstances.

B. Procedural Aspects.

Appellant also declaims that the procedure employed with regard to the forfeiture order deprived him of four intertwined rights: the right to present a closing argument, the right to be present to assist counsel during the closing argument, the right to entry of a verdict of forfeiture, and the right to be present for entry of a verdict. This quadrant of complaints is unavailing.

The first two grievances are not supported by the record. Even though appellant was absent on March 26, the court offered his counsel the opportunity to make further arguments at the disposition hearing (at which appellant was in attendance). Affording appellant this opportunity satisfied his right to make a closing statement and his right personally to assist counsel. The fact that appellant chose not to avail himself of the afforded opportunity is beside the point.

Appellant's next contention arises out of the idea that the court violate Fed.R.Crim.P. 32(b) and 31(e) by ordering forfeiture without entering a special verdict. Because appellant did not object to the district court's decision to make an oral forfeiture order followed by a written decision, however, our review is limited to a hunt for plain error. See United States v. Taylor, 54 F.3d 967, 972-73 (1st Cir.1995); Griffin, 818 F.2d at 99.

To be sure, Rule 31(e) requires that a special verdict be returned when the indictment or information contains a forfeiture allegation. But, Rule 31(a) makes it transpicuously clear that this requirement is geared to jury trials. See Fed.R.Crim.P. 31(a) (stating that the verdict "shall be returned by the jury to the judge in open court"). When the judge is the factfinder, the procedure for making factual determinations is governed by Fed.R.Crim.P.23(c). That rule provides:

> In a case tried without a jury the court shall make a general finking and shall in addition, on request make before the general finding, find the facts specially. Such findings may be oral. If an opinion or

> memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Fed.R.Crim.P. 23(c)

In the instant case, the judge entered an oral order, followed very shortly by a written memorandum limning his findings of fact. In our opinion, this procedure did not constitute plain error. See e.g., Gibbs v. Buck, 307 U.S. 66, 78, 58 S.Ct. 725, 732, 83 L.Ed. 1111 (1939); see also Aoude v. Mobil Oil Corp., 862 F.2d 890, 895 (1st Cir.1988) (observing that reversal "would be an empty ritual" once the lower court had remedied its original error and belatedly made written findings). Thus, we deny appellant's request that the forfeiture order be vacated on this score.

C. Extent of the Forfeiture.

Appellant maintains that the "proceeds" subject to RICO forfeiture should not include all the funds laundered by this organization, but only the organization's profit. He does not dwell on this thesis, instead electing to incorporate the codefendants' argument to this effect. We, too, prefer not to linger. The district court treated this contention at length, and we find ourselves in substantial agreement with the reasoning explicated in that court's opinion. See Saccoccia, 823 F.Supp. at 1001-01.

VI. SENTENCING

Without objection, the district court predicated its sentencing calculations on the November 1, 1992 edition of the federal sentencing guidelines.[26] See United States v. Harotunian, 920 F.2d 1040, 1041-42 (1st Cir. 1990) ("Barring any ex post facto problem, a defendant is to be punished according to the guidelines in effect at the time of sentencing.") The court compiled appellant's criminal history score and placed him in category II. Turning to the other side of the grid, the court started with the money laundering guideline. Since appellant had been convicted under 18 U.S.C. § 1956 (a)(2)(A), he had a base offense level (BOL) of 23. See U.S.S.G. § 2S1.1(a)(1). The court then added 13 levels because the value of the laundered funds exceeded $100,000,000, See id. § 2S1.1(b)(2)(N), and three levels premised on a finding that appellant knew (or believed) that the funds were derived from narcotics sales, see id. § 2S1.1(b)(1). Finding appellant to be the organizer and leader of the money laundering enterprise, the court escalated four levels pursuant to U.S.S.G. § 3B.1(a). Finally, citing appellant's unsuccessful attempt to use his medical history as a device for extracting a continuance, see supra note 2, and stressing that the feigned illness occurred shortly after the court had denied appellant's request for postponement of the trial on other grounds, Judge Torres went up two levels for obstructing justice. See U.S.S.G. § 3C1.1. These calculations yielded an adjusted offense level of 45 for the money laundering counts.

---

[26] In large part, the district judge adopted the calculations recommended by the probation department. We concentrate on how the court arrived at the guideline sentencing range (GSR), and do not differentiate between the judge's original thinking and his acceptance of the probation department's ideas.

The court then turned to the RICO conspiracy count. Inasmuch as the applicable guideline, id § 2E1.1, prescribes the use of an offense level equal to the greater of 19 or the adjusted offense level for the underlying conduct (here, money laundering), appellant's adjusted offense level remained unchanged. The court took a similar look at the Travel Act counts with a similar result (the applicable guideline, U.S.S.G. § 2E1.2, directs the use of an offense level equal to the greater of 6 or the adjusted offense level for the underlying conduct). At the bottom line, then, the counts of conviction produced a total offense level (TOL) of 45. See id. §§ 3D1.2(d), 3D1.3(b).

A TOL of 43 or higher requires the imposition of a sentence of life imprisonment regardless of the offender's criminal history category.[27] See U.S.S.G. Ch. 5, Pt. A (Sentencing Table). However, the offenses of conviction in this case all carry maximum sentences less that life. When, as in this instance, the maximum sentence for each offense is lower than the minimum punishment mandated by the applicable GSR, the guidelines require imposition of consecutive sentences "to the extent necessary to produce a combined sentence equal to the total punishment." Id. § 5G1.2(d). Applying this principle, the district court concluded that sentences on the several counts of conviction should run consecutively to the extent necessary to effectuate a life sentence. Because the sentencing guidelines prescribe life in prison for persons who, like appellant, sport a TOL of 43 of higher, whereas all the counts of convictions have statutory maxima that are expressed in terms of a finite number of years, the court imposed the longest possible sentence on each count and ran the sentences consecutive to one another. The result: an incarcerative sentence of 660 years.[28]

---

[27] The Sentencing Commission recently submitted to Congress proposed a guideline amendments that apparently would reduce the sentence mandated for conduct of the kind at issue here. See 60 Fed.Reg. 25,074, 25,085-86 (1995). The proposed changes will become effective November 1, 1995, absent congressional action to the contrary. See 28 U.S.C. § 994(p) (1988). The Commission has not yet decided whether the changes, if they become law, should apply retrospectively. See 60 Fed.Reg. at 25,074. If the amendments are eventually determined to warrant retroactive application, appellant may then be in a position to seek appropriate relief int he district court. See United States v. Connell, 960 F.2d 191, 197 n. 10 (1st Cir.1992); United States v. Miller, 903 F.2d 341, 349 (5th Cir.1990). We express no opinion on the subject, but merely note the possibility and proceed without further reference to what the future may bring.

Appellant assails this sentence on manifold grounds. His principal lines of attack are that mandatory life sentences under the guidelines are illegal; that the district court misconceived its authority in imposing sentence; that the court violated the Ex Post Fact Clause; and that the court erred in making upward adjustment for obstruction of justice.

A. The Mandatory Life Sentence.

---

[28] The district court imposed this type of sentence rather than attempting to estimate the length of appellant's life and then fashioning a sentence of corresponding duration. We find no fault with this approach. Despite the superficial severity of a 660-year sentence, it is neither more nor less than the functional equivalent of life without parole. We treat the sentence in this light in evaluating its correctness under the guidelines and its harshness for Eighth Amendment purposes.

Appellant contends that he imposition of mandatory life sentence is illegal both because Congress disavowed consecutive sentences and because, in all events, a life sentence in the circumstances of this case insults the Eighth Amendment's proscription against cruel and unusual punishment. Neither of these Contentions is convincing.

1. Congressional Intent. It is apodictic that the sentencing guidelines cannot sweep more broadly than Congress' grant of power to the Sentencing Commission permits. See United States v. Cooper, 962 F.2d 339, 342 (4th Cir.1992). Thus, if a guideline conflicts with a statute, the latter prevails. See Stinson v. United States, -- U.S. --,-- - --, 113 S.Ct. 1913, 1918-19, 123 L.Ed.2d 1, 2, (1st Cir.1992), cert. denied, -- U.S. --, 113 S.Ct. 1830, 123 L.Ed.2d 458 (1993). Appellant perceives such a collision here. In his view, Congress mandated a strong statutory preference for concurrent sentences, and the Sentencing Commission's instruction that fixed-year sentences should be imposed consecutively to effectuate life imprisonment, see U.S.S.G. § 5G1.2(d), must yield the right of way to Congress' expressed preference.

Appellant hinges this conclusion on Congress' enactment of two statutory provision, namely, 28 U.S..> §§ 994(l)(2) & 994(v) (1988). We think he reads the cited statutes with much too sanguine an eye. Neither statute prohibits the imposition of consecutive sentences. Rather, section 994(l)(2) merely directs the Commission to "limit[] consecutive terms of imprisonment" for convictions on related general and specific offenses.[29] While these statutes arguably imply a general congressional preference for concurrent sentences, they do not, as appellant intimates, outlaw consecutive sentences. On the contrary, the statutory scheme leaves ample room for courts, following the lead of the Sentencing Commission, to deploy consecutive sentences in appropriate circumstances.

Two observations show the virtual inevitability of this conclusion. In the first place, U.S.S.G. § 5G1.2 became effective only with the consent of Congress. We consider this to be powerful evidence that Congress itself saw no inconsistency between the guideline provision and the statutory scheme. See United States v. Lueddeke, 908 F.2d 230, 233 (7th Cir.1990). In the second place, Congress minced no words in ceding the Commission discretion to determine what particular circumstances would trigger the need for consecutive sentences. See 18 U.S.C. § 3584(a) (1988) (providing in part that "if multiple terms of imprisonment are imposed on a defendant at the same time ... the terms may run concurrently or consecutively"); se also United States v. Flowers, 995 F.2d 315, 316-17 (1st Cir.1993) (holding that section 3584(a) authorizes the Sentencing Commission "to write guidelines that say when, and to what extent, [incarcerative] terms should be concurrent or consecutive").

---

[29] To the extent appellant's argument is based on a claimed congressional preference for concurrent sentences in connection with conspiracy and its object offenses, and in connection with general specific offenses, the 36 count consecutive ten-year sentences imposed for separate violations of 18 U.S.C. § 1957 are unaffected. These sentences total 360 years. Barring a lifespan of biblical proportions, appellant's time on this mortal coil will not exceed so lengthy an interval.

We will not flog a dead horse. Because Congress gave the Sentencing Commission expansive authority to promulgate guidelines specifying when sentences should be consecutive or concurrent, and then directed sentencing courts to refer to the guidelines in order to determine whether "multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively," 28 U.S.C. § 994(a)(1)(D), the court below possessed the power - indeed, the responsibility - to impose a series of consecutive sentences effectuating the clearly expressed command of W.S.S.G. § 5G1.2.

2. The Eighth Amendment. Appellant bemoans his sentence as mocking the Eighth Amendment's proscription against cruel and unusual punishments. This ululation is more cry that wool.

In Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001,77 L.Ed.2d 637 (1983) the Supreme Court held that "as a matter of principle ... a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. at 290, 103 S.Ct. at 3009. This opinion did not usher in a regime of strict proportionality review applicable to all criminal sentences, for the Court restricted its holding to penalties that are "grossly" or "significantly" disproportionate to the underlying criminal activity. Id. at 288, 303, 102 S.Ct. at 3008, 3016-17. The Court did not in any way, shape, or form, then or thereafter, suggest that the Eighth Amendment requires a precise calibration of crime and punishment in noncapital cases.

Solem looms as the high water mark of the proportionality approach. In the pre-Solem era, the Court consistently recognized the legislature's primacy in determining the appropriate punishment for criminal behavior, see e.g. Rummel v. Estelle, 445 U.S. 263, 274, 100 S.Ct. 1133, 1139, 63 L.Ed.2d 382 (1980); Hutto v. Davis, 454 U.S. 370, 374, 102 S. Ct. 703, 705-06, 70 L.Ed.2d 556 (1982) (per curiam), and the Court has sounded much the same note in the post-Solem era, see, e.g., Harmelin v. Michigan, 501 U.S. 957, 962, 111 S. Ct. 2680, 2684, 115 L.Ed.2d. 836 (1991) (opinion of Scalia, J.) (expressing the view that the length of the sentence actually imposed in respect to a felony conviction is entirely a matter of legislative prerogative); id. at 998-99 111 S.Ct. at 2703-04 (opinion of Kennedy, J.) (Similar; listing cases). Throughout, the Justices have made it quite clear that strict judicial scrutiny of statutorily mandated penalties in noncapital cases is not to be countenanced. See e.g. Gore v. United States, 357 U.S. 386, 393, 78 S.Ct. 1280, 1284-85, 2 L.Ed.2d 1405 (1958). The Constitution does not require legislatures to balance crimes and punishments according to any single standard, or to achieve perfect equipoise. Indeed, the Solem Court itself acknowledged the need for judges to "grant substantial deference to the broad authority that legislatures necessarily posses in determining the types and limits of punishment for crimes." Solem, 463 U.S. at 290, 103 S.Ct. at 3009-10.

The Court also had sounded two cautionary notes. First, "[t]he inherent nature of our federal system" necessarily produces "a wide range of constitutional sentences," Id. at 291 n. 17, 103 S.Ct. at 3010 n. 17; see also Rummel, 445 U.S. at 282, 100 S.Ct. at 1143. Second, "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual [judges]; judgement should be informed by objective factors to the maximum possible extent." Coker v. Georgia, 422 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977); accord Solem, 463 U.S. at 290, 103 S.Ct. at 3009-10. For these reasons, "s reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." Id. at 290 n. 16, 103 S.Ct. at 3010 n. 16.

The Justices' most recent pronouncements fully support the conclusion that serious crimes may result in the imposition of sentences as severe as life imprisonment without working any constitutional insult. In Solem, the Court explicitly contrasted the defendant's "relatively minor" offenses, id. ar 296-97, 103 C.St. at 3013, with "very serious offenses" such as drug trafficking, id. at 299, 103 S.Ct. at 3014, and suggested that statutes providing for life imprisonment might be applied constitutionally to inveterate drug dealers of other violent criminals, id. at 199 n. 26, 103 S.Ct. at 3014 n. 26.

Harmelin, fairly read, emits an even clearer signal. There, the Court considered the application of the constitutional prohibition against cruel and unusual punishment to a mandatory sentence of life imprisonment without parole imposed in a narcotics case against a defendant who possessed more that 640 grams of cocaine. See Harmelin, 501 U.S. at 961, 111 S.Ct. at 2686. He concluded that "Solem was simply wrong," id., because the Eighth Amendment provided protection with respect to modes and methods of punishment, not the length of incarceration, see id. at 966-67, 111 S.Ct. at 2686-87. Justice Kennedy thought that stare decisis counseled adherence to a "narrow proportionality principle," id. at 996, 111 S.Ct. at 2702, one that recognizes that the "Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime," id. at 1001, 111 S.Ct. at 2705 (quoting Solem). After noting the grave harm to society wreaked by illegal drugs, Justice Kennedy found nothing "grossly disproportionate" in either the length nor the mandatory nature of Harmelin's sentence. See id. at 1001-08, 111 S.Ct. at 2705-09.

A dispassionate application of Harmelin to this case defeats appellant's attack on the constitutionality of his sentence. Although the Justices in Harmelin disagreed on the status of proportionality review under the Eighth Amendment, a majority found insufficient disproportionality to forestall a mandatory sentence of life without parole for possession of over 650 grams of cocaine. With this as a reference point, appellant's sentence can hardly be deemed "grossly disproportionate" to the underlying conduct - conduct which, by all account, significantly facilitated narcotics trafficking on a Brobdingnagian scale.[30]

---

[30] Appellant's reliance on United States v. Heath, 840 F.Supp. 129 (S.D.Fla.1993), is misplaced. In Heath, the district court, after expressing concern over the proscription against cruel and unusual punishment, declined to impose a life sentence as directed by the guidelines and instead departed downward by extrapolating from the sentencing table. See id. at 130-32. We deal with appellant's claim

To say more would be supererogatory. We know that Harmelin is not an aberration; in Hutto, another case that teaches much the same lesson, the Court upheld, against a proportionality attack, a sentence of 40 years in prison for possessing nine ounces of marijuana with the intent to distribute it. 454 U.S. at 374, 102 S.Ct. at 705-06. We also know that Congress - no the judiciary - is vested with the authority to define, and attempt to solve, the societal problems created by drug trafficking across national and state borders. The Supreme Court has made it plain that the use of severe penalties as part of the legislative armamentarium does not constitute cruel and unusual punishment. See, e.g., Harmelin, supra; Hutto, supra; see also United States v. Munoz, 36 F.3d 1229, 1239 (1st Cir.1994), cert. denied, -- U.S. --, 115 S.Ct. 1164, 130 L.Ed.2d 1120 (1995). Under this light, the flimsiness of appellant's Eighth Amendment challenge becomes apparent.

B. The Refusal to Depart.

As a general rule, "a district court's refusal to depart, regardless of the suggested direction, is not appealable." United States v. Romolo, 937 F.2d 20, 22 (1st Cir.1991). There is, of course, an exception that applies "if the record supports an inference that the sentencing court's failure to depart did not represent an exercise of factfinding or discretion, but was instead the product of a

---

that the court below should have departed downward in Part VI(B), infra.

court's miscalculation about whether is possessed the authority to depart." United States v. Amparo, 961 F.2d 288, 292 (1st Cir.), cert. denied, -- U.S. --, 113 S.Ct. 224,121 L.Ed.2d 799 (1995). Appellant attempts to wedge his case within the dimensions of this exception on the ground that the sentencing court believed, erroneously, that it lacked discretion to impose concurrent sentences. This claim misconstrues the record.

In United States v. Quinones, 26 F.3d 213 (1st Cir.1994), we held that a court may deviate from U.S.S.G. § 5G1.s "if, and to the extent that, circumstances exist that warrant a departure." Id. at 216. Although Quinones had not yet been decided when Judge Torres sentenced Saccoccio, we are satisfied that he understood this principle and anticipated out holding.

At the disposition hearing, appellant argued that the district court had authority under 18 U.S.C. § 3584(a) to depart downward and impose concurrent sentences on all counts notwithstanding the terms of U.S.S.G. § 5G1.2. The court acknowledged that it possessed such authority, but it concluded (appropriately, we think) that because the guidelines required consecutive sentences in appellant's case, it could only impose concurrent sentences if the case satisfied the conditions for a downward departure, that is, if it found mitigating circumstances not considered by the Sentencing Commission. See U.S.S.G. § 5K2.0. Discerning no such mitigation, the court eschewed a downward departure. In other words, the court realized that it could impose concurrent sentences as a specie of downward departure, cf. Quinones, 26 F.3d at 216 (authorizing the imposition of consecutive sentences as a specie of upward departure_, but it chose not to do so because, in its judgement, the facts did not warrant a downward departure.

This ends our jaunt. Inasmuch as the district court correctly understood that it possessed the power to depart from the GSR but made a discretionary decision to refrain from exercising that power, we lack jurisdiction to address appellant's claim. See Pierro, 32 F.3d at 619 (explaining that a discretionary refusal to depart by a judge who recognizes his power, but who says, in effect, that the case before him is not "sufficiently unusual to warrant departing." is not reviewable on appeal).

B. Ex Post Facto Concerns.

Appellant seeks to incorporate an argument advanced on appeal by his codefendants to the effect that the district court's sentencing determination abridged the Ex Post Fact Clause, U.S. Const. art. I, § 9, cl. 3. In appellant's view, the court's error lay in increasing his TOL based on an amendment to the money laundering guideline, U.S.S.G. § 2S1.1(b)(1),[31] that did not become effective until November 1, 1991 - during the lifespan of the conspiracy, but subsequent to the last proven instance of money laundering. This criticism fails for at least three reasons.

---

[31] The amendment inserted the words "or believed" into section 2S1.1(b)(1), see U.S.S.G.App. C, Amend. No.378 (1992), with the result that the guideline, subsequent thereto, read in pertinent part: "If the defendant knew of believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics of other controlled substances, increased [his BOL] by 3 levels."

First, appellant did not broach the topic at sentencing. He has, therefore, waived it. See United States v. Dietz, 950 F.2d 50, 55 (1st Cir.1991) (explaining that "in connection with sentencing as in other contexts, ... arguments not seasonably addressed to the trial court may not be raised for the first time in an appellate venue"); accord, e.g. United States v. Piper, 35 F.3d 611, 620 n. 6 (1st Cir.1994), cert. denied, -- U.S. --, 115 S.Ct. 1118, 130 L.Ed.2d 1082 (1995); Sepulveda, 15 F.3d ar 1202.

Second, appellant was not only the mastermind of the money laundering ring, but also its chief executive officer, comptroller, sales manager, and director of operation. The weight of the evidence heavily preponderates in favor of a finding that appellant know and believed of the money's origins. Indeed, appellant wholly fails to demonstrate how and where the district court erred in determining his level of "knowledge or belief," or why the guideline revision makes any real difference in his case. This failure - typical of litigants who attempt to incorporate by reference arguments which, if made in earnest, deserve individualized attention - is fatal to appellant's cause. See e.g. Zannino, 895 F.2d at 17 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Third, even if appellant were somehow to surmount the two hurdles we have just described, he could prevail only upon a showing of plain error. See United States v. Olano, -- U.S. --, -- - --, 113 S.Ct. 1770, 1776-78, 123 L.Ed.2d 508 (1993); United States v. Olivier-Diaz, 13 F.3d 1, 5-6 (1st Cir.1993). Given the strict requirements that attend amelioration under the plain error doctrine, and the substantial discretion invested in appellate courts with regard to the doctrine's use, see generally Taylor, 54 F.3d at 972-73 plain error is plainly absent here. Put bluntly, we detect nothing in appellant's belated assault that causes us to question "the fundamental fairness or basic integrity of the proceeding below in [any] major respect." Id. at 973.

D. Obstruction of Justice.

Appellant's fourth line of attack suggests that the sentencing court erred in elevating his offense level for obstruction of justice. This sortie is moot. The only practical effect of the adjustment is to raise the TOL from 43 to 45. Since life imprisonment is mandatory at or above TOL 43, see U.S.S. G. § 5G1.2; see also U.S.S.G. § 5A, comment. (n. 2) ("An offense level of more than 43 is to be treated as an offense level of 43."), canceling the enhancement would accomplish nothing.

It is this court's settled practice not to address an allegedly erroneous sentencing computation if, and to the extent that, correcting it will neither change the defendant's sentence nor relieve him from some unfair collateral consequence. See, e.g., Sepulveda, 15 F.3d at 1199; United States v. Bradley, 917 F.2d 601, 604 (1st Cir.1990). We believe that this philosophy is fully applicable in a situation where, as here, correction of an allegedly erroneous finding would not eliminate the certainty of a mandatory sentence of life imprisonment. Courts should not tilt at windmills.

VII. CONCLUSION

We need go no further. Having scoured the record and carefully considered appellant's entire asseverational array (including some arguments not specifically discussed herein), we detect no reversible error. As we see it, appellant was lawfully extradited, fairly tried, justly convicted , and appropriately punished.

APPENDIX B

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

vs.

STEPHEN A. SACCOCCIA

OPINION

TORRES, District Judge.

Stephen Saccoccia, Donna Saccoccia, Anthony DeMarco, Vincent Hurley, James Saccoccio, Kenneth Saccoccio, Stanley Cerilla, Stephen Pizzo, and Carlo DeMarco have been convicted of a variety of offenses stemming from what the indictment describes as a conspiracy to launder more than $136 million derived from the illegal sale of narcotics. All of the defendants were found guilty of RICO conspiracy violations under 18 U.S.C. § 1962(d). In addition, most of the defendants were found guilty of one or more related substantive offenses, namely, filing false currency transactions reports (CTR's) in violation of 31 U.S.C. § 5324(2); structuring cash transactions with financial institutions in violation of 31 U.S.C. § 5324(3); engaging in monetary transactions in criminally derived property in violation of 18 U.S.C. § 1957; money laundering in violation of 18 U.S.C. § 1956; and/or Travel Act violations under 18 U.S.C. § 1952.

In entering judgment under Federal Rule of Criminal Procedure 32(b), the Court is now called upon to determine what "property" each defendant should be required to forfeit pursuant to 18 U.S.C. §§ 1963(a) and/or 982.[1] In making that determination, the Court must construe those statutes and make findings regarding the respective roles of the defendants in the offenses of conviction.

BURDEN OF PROOF

Before reciting its findings of fact, the Court feels compelled to make mention of the uncertainty regarding the standard of proof applicable to criminal forfeiture determinations. See United States v. Ofchinick, 883 F.2d 1172, 1177 n. 1 (3rd Cir. 1989), cert. denied sub nom. Delucia v. United States, 493 U.S. 1034, 110 S.Ct. 753, 107 L.Ed.2d 769 (1990). On the one hand, there is no question that criminal forfeiture is imposed as a sanction against a defendant. S. Rep. No. 225, 98th Cong. 2d Sess., 191, 193 (1984), reprinted in, 1984 U.S. Code Cong. & Admin. News 3182, 3376. See also United States v. Cauble, 706 F.2d 1322, 1349 (5th Cir. 1983), cert denied, 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1984) ("The RICO forfeiture is in personam: a punishment imposed on a guilty defendant.")

---

[1] The amount to be forfeited by Vincent Hurley was submitted to the jury which returned a special verdict providing for forfeiture of § 136, 344, 231.86 pursuant to 18 U.S.C. § 1963(a)(3) and $52,800.00 pursuant to 18 U.S.C. § 982. The remaining defendants have waived any right to a jury trial with respect to the forfeiture issues.

"[I]t goes only to the penalty imposed rather than to the individual's criminal liability." United States v. Caporale, 806 F.2d 1487, 1508 (11th Cir. 1986), cert. denied, 483 U.S. 1021, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987). Thus, criminal forfeiture is part of the sentencing process and not an element of the crime itself. United States v. Horak, 833 F.2d 1235, 1246 (7th Cir. 1987). Accordingly, it has been held that due process does not require application of the beyond a reasonable doubt standard. United States v. Elgersma, 971 F.2d 690, 694 (11th Cir. 1992).

On the other hand, neither § 1963(a) nor § 982 provide any explicit guidance as to what standard of proof Congress intended to apply under those statutes. Moreover, those cases touching on the issue generally do so without explanation. See, e.g., United States v. Cauble, 806 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1984); United States v. Horak, 833 F.2d 1235 (7th Cir. 1987).

One notable exception is United States v. Pryba, 674 F.Supp. 1518 (E.D.Va. 1987). There, the court held that, under RICO, proof beyond a reasonable doubt was required. The court noted that Congress had provided for a preponderance of the evidence standard in other statutes and concluded that "[b]y choosing not to use the same language in § 1963(a) Congress has invited the inference that the reasonable doubt standard should be employed throughout a RICO proceeding except where there is explicit provision otherwise." Id. at 1521. Furthermore, the Pryba court pointed out that:

> There is not requirement in RICO that the guild or

> innocence phase of the trial be bifurcated from the forfeiture phase. Often the phases are tried together . . . Surely there can be no question that the reasonable doubt standard applies to the first phase. Almost as free from doubt is the inference that had Congress intended a different standard to apply, it would have recognized and addressed the practical difficulties involved in applying different proof standards to interrelated issues in the same proceeding.

Id. at 1521 (citations omitted).

In this case, the Court need not address the burden of proof issue because the government does not dispute that the beyond a reasonable doubt standard should be applies. Hopefully, Congress or the Supreme Court will provide definitive guidance on the subject before it becomes a pivotal issue in too many cases.

FACTS

Between 1986 and his arrest in November, 1991, Stephen Saccoccia was the de facto owner and manager of several corporations ostensibly engaged in the business of buying, selling, and refining gold and other precious metals in Rhode Island, New York and California. The remaining defendants were employed at various times and in various capacities by Saccoccia and/or his corporations, and they acted pursuant to Saccoccia's instructions. In fact, much of the "business" in which the defendants were engaged consisted of "laundering" the proceeds of illegal narcotics sales for a Colombian drug cartel and its agents including Duvan Arboleda, Fernando Duenas, and Raoul Escobar.

Stephen Saccoccia's money laundering activities began in 1987 when he caused cash received from Arboleda to be delivered to Barry Slomovitz, another money launderer in New York. Slomovitz used the cash to covertly purchase gold that he resold on the open market. The amounts realized from those sales were wired to bank accounts maintained by two of Saccoccia's corporations. Trend Precious Metals ("Trend") in Cranston, Rhode Island, and International Metal Marketing ("IMM") in Los Angeles, California. In order to create the appearance that the funds transferred were derived from legitimate business transactions, Stephen and donna Saccoccia caused phony invoices to be issued to Slomovitz falsely indicating that the amounts wired to Trend and IMM were payments for gold purchases.

By 1990, Saccoccia's money laundering enterprise had expanded, and he began operating independently from Slomovitz. Cash received from Arboleda, Duenas, or Escobar was delivered to the defendants in New York City in a variety of ways. Sometimes Vincent Hurley or Anthony DeMarco met couriers at pre-arranged locations. On other occasions, couriers delivered the cash to one of Trend's New York offices. In one instance during August, 1991, $3 million was delivered to Stephen and Donna Saccoccia's apartment in Manhattan.

The cash was delivered in amounts that generally ranged from $50,000.00 to $500,000.00 and consisted of large numbers of small denomination bills carried in gym bags or luggage. the cash usually was counted by Stephen Saccoccia, Donna Saccoccia, and/or Richard Gizzarelli, an unindicted conspirator. Occasionally, they were assisted by Anthony DeMarco, Vincent Hurley, and David Izzi, an indicted co-conspirator.

After the cash was counted, some of it was sent to Trend or Saccoccia Coin Company ("Saccoccia Coin"), another one of Saccoccia's Rhode Island companies. The remainder was sent to IMM in Los Angeles. Initially, the cash sent to Rhode Island was shipped via Loomis or Brinks armored cars. However, when Saccoccia became concerned that law enforcement authorities might be monitoring those shipments, he arranged to have the cash transported to Cranston, Rhode Island by Richard Gizzarelli, Anthony DeMarco, Carlo DeMarco, Vincent Hurley, and David Izzi. Usually, Gizzarelli and one of the defendants drove from New York to a rendezvous point in Connecticut where they transferred the cash to Izzi and two of the other defendants who brought it back to Rhode Island.

When the cash arrived at Trend or Saccoccia Coin, it was counted again by Vincent Hurley, David Izzi, Carlo DeMarco, Anthony DeMarco, Kenneth Saccoccio, James Saccoccio, Stanley Cerilla and/or Stephen Pizzo and divided into packets that usually contained less than $10,000.00 each. The packets, then, were taken to a number of different banks and used to purchase cashier's checks payable to Trend. In that way, the defendants circumvented the currency transaction reporting requirements of 31 U.S.C. § 5313 which required financial institutions to file reports containing the identities of persons engaging in cash transactions involving more than $10,000.00.[2] When cashier's checks for more than $10,000.00 were purchased, they generally were made payable to corporations nominally controlled by Anthony DeMarco even though the defendants knew that the cash actually belonged to Saccoccia. The amount of the checks purchased in this fashion by each defendant was as follows:

Name	Time Period	Amount
James Sacccccio	March 23,1990 to October 29, 1990	$ 2,993,445.00
Kenneth Saccoccio	March 1, 1990 to May 28, 1991	$11,258,955.00

---

[2] The form on which the financial institution must make its report is I.R.S. Form 4789 which is called a currency transaction report and which must be filed by the bank with the I.R.S. within 15 days after the transaction occurs. The information to be reported on a CTR includes the identity of the individual who conducted the currency transaction with the bank, the individual or organization for whom the transaction was conducted, and a description of the transaction. 31 U.S.C. § 5313, 31 C.F.R. § 103.22(a)(1).

It is a violation of 31 U.S.C. § 5324(2) to cause a domestic financial institution to file false CTR's for the purpose of evading the reporting requirements established by 31 U.S.C. § 5513. It is a violation of 31 U.S.C. § 5324(3) to structure or attempt to structure transactions with domestic financial institutions for the purpose of evading the reporting requirements established by 31 U.S.C. § 5313. Structuring includes the breaking down of an amount of currency exceeding $10,000.00 into sums of less than $10,000.00 to prevent CTR's from being filed. Structuring also includes breaking an amount of currency exceeding $10,000.00 into smaller amounts greater than $10,000.00 to prevent them from being reported as a single transaction.

Anthony DeMarco	March 6, 1990 to August 7, 1991	$11,250,958.79
David Izzi	April 6, 1990 to August 22, 1991	$11,952,715.00
		$37,456,100.79

The checks payable to Trend were deposited in Trend's account at Citizens Bank which was controlled by Stephen and Donna Saccoccia. The checks payable to other entities were deposited into accounts in the names of those entities and then transferred into Trend's account at Citizens. The cash sent to IMM was used to covertly purchase gold that was later sold at a loss on the open market. The amounts realized were deposited in Los Angeles banks and wired to Trend's account at Citizens.

Between January 1, 1990 and April 2, 1991, Stephen and Donna Saccoccia wired $136,344,231.86 from Trend's account at Citizens to various Colombian and other foreign bank accounts, designated by Arboleda or Duenas, thereby completing the money laundering cycle.

THE FORFEITURE ALLEGATIONS

As already noted, all of the defendants were convicted of RICO conspiracy in violation of 18 U.S.C. § 1962(d). In addition, all of the defendants except Carlo DeMarco and Stephen Pizzo were convicted of substantive violations as follows:

Defendant	Offense	No. of Counts of Conviction	Amount
S. Saccoccia[3]	18:1957	36	$4,743,457.00
	18:1956	13	$4,639,300.75
D. Saccoccia	18:1957	47	$5,623,157.00
	18:1956	13	$4,639,300.75
A. DeMarco	31:5324(2)	5	$ 292,000.00
	31:5324(3)	2	$ 73,000.00
V. Hurley[4]	31:5324(3)	1	$ 52,800.00
J. Saccoccio	31:5324(3)	15	$ 707,750.00
K. Saccoccio	31:5324(3)	14	$ 665,750.00
S. Cerilla	31:5324(3)	1	$ 52,800.00

Pursuant to 18 U.S.C. § 1963(a)(1) and (2), the government seeks forfeiture of the Saccoccias' interest in all assets, including bank accounts, of Trend, Saccoccia Coin and IMM as well as International Chain Sales, Vogue Precious Metals, Refined Metals, Gold Enterprises Refinery, and SASCO Refining Company, which were other companies used in the defendants' money laundering activities. In addition, the government alleges that, under 18 U.S.C. § 1963(a)(3), each defendant should forfeit the amount of

---

[3] Stephen Saccoccia and Vincent Hurley were also convicted of Travel Act violations under 18 U.S.C. § 1952. However, that is not an offense for which the penalty of forfeiture may be imposed

[4] See supra note 3.

$136,344,231.86 which the government contends is the amount "constituting or derived from [the] proceeds" obtained by the defendants from racketeering activity. Finally, the government asserts that, under the Criminal Forfeiture statute, 18 U.S.C. § 982(a), each defendant should be required to forfeit the amounts involved in the transactions that were the subjects of the substantive offenses for which that defendant was convicted.

Those claims raise several issues of first impression regarding the manner in which the forfeiture provisions contained in both RICO and the Criminal Forfeiture statute should be construed. In analyzing those provisions, a page of history is worth a volume of logic.

DISCUSSION

I. Historical Background

The origins of both criminal and civil forfeiture may be traced to English common law. Criminal forfeiture was a penalty constituting one of the incidents of the state of attainder in which individuals convicted of felonies were placed.[5] See generally Avery v. Everett, 110 N.Y. 317, 18 N.E. 148 (1888). It operated in personam against the defendant and required that all of the goods, chattels, lands, and tenements of the attainted felon be forfeited to the king as part of the felon's punishment for committing the crime. The defendant's property was forfeited whether or not it was linked to the crime.

---

[5] The other incidents of the state of attainder were corruption of blood which prevented descent of the felon's estate to his heirs causing it to escheat and civil death which disqualified the attainted felon from bringing legal action, from being a witness, and from performing any legal function.

Civil forfeiture, on the other hand, resulted from an in rem proceeding against property itself. It was based on the notion that property associated with criminal activity was tainted and, therefore, became forfeitable even if not owned by the person perpetrating the crime.

Abuses of the bill of attainder by the English monarchy led the Framers of our Constitution to limit the application of criminal forfeiture. Thus Article III, Section 3 prohibits forfeiture as a penalty for treason except during the life of the person attainted. In 1790, the First Congress extended that prohibition by eliminating forfeiture of one's estate and corruption of blood as penalties for all felonies. Act of April 30, 1790, Ch. 9, § 24, 1 Statutes at Large 117. See United States v. Huber, 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980).

In 1970, Congress revived the penalty of criminal forfeiture when it enacted the RICO statute. 18 U.S.C. § 1963. At the same time, it provided for civil forfeiture of property used in connection with or received as the proceeds of narcotics offenses. See, e.g., 21 U.S.C. § 881. In 1986, forfeiture provisions similar to those of RICO were made applicable to money laundering and CTR violations. 18 U.S.C. § 982.

Under those statutes, the historical distinctions between criminal and civil forfeiture have become somewhat blurred. Criminal forfeiture continues to be an in personam penalty. However, unlike its common law ancestor, it now requires a nexus between the crime and the property forfeited. Moreover, the description of that nexus varies from statute to statute for reasons that are not readily apparent.

II. The RICO Forfeiture Statute - 18 U.S.C. § 1963

RICO requires that any person who violates its provisions shall forfeit:

> (1) any interest the person has acquired or maintained in violation of [RICO];
>
> (2) any -
>
> (A) interest in; [or]
>
> . . . .
>
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted or participated in the conduct of, in violation of [RICO]; and
>
> (3) Any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . .

18 U.S.C. § 1963(a).

Subsection 1963(m) contains a "substitution of assets" provision which states that:

> (m) If any of the property described in subsection (a), as a result of any act or omission of the defendant -

> (1) cannot be located upon the exercise of due diligence;
>
> (2) has been transferred or sold to, or deposited with, a third party;
>
> (3) has been placed beyond the jurisdiction of the court;
>
> (4) has been substantially diminished in value; or
>
> (5) has been commingled with other property which cannot be divided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. § 1963(m).

A. "Interest" and "Proceeds"

In this case, it is clear that Stephen Saccoccia controlled and Donna Saccoccia participated in the criminal enterprise described in the indictment. It is equally clear that the enterprise included Trend, Saccoccia Coin, IMM, International Chain Sales, Vogue Precious Metals, Refined Metals, Gold Enterprise Refinery, and SASCO Refining Company. Therefore, any interest the Saccoccias have in those entities is forfeitable under 18 U.S.C. § 1963(a)(2).[6]

What is not so clear is the nature of the property forfeitable under §§ 1963(a)(1), (3), and/or (m). Those subsections describe four kinds of property subject to forfeiture:

1. any "interest" acquired in violation of RICO;

2. "proceeds" of the racketeering activity;

3. property "derived from" such proceeds; and

4. "substitute assets" equivalent in value to any such "proceeds" or property that have been concealed, transferred, or otherwise disposed of by the defendant.

---

[6] Neither the RICO forfeiture allegations nor the money laundering forfeiture allegations aver that any of the other defendants have any forfeitable interest in those entities.

The Supreme Court has held that the term "interest," as used in § 1963(a)(1), is not limited to a defendant's interest in the enterprise but, rather, encompasses any interest acquired in violation of RICO. Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). Moreover, it has stated that "interest" should be construed broadly and "comprehends all forms of real and personal property, including profits and proceeds." Id. at 21, 104 S.Ct. at 299.

In Russello, it was determined that money paid to the appellant by an insurance company pursuant to fraudulent fire insurance claims was forfeitable under § 1963(a)(1) as an interest acquired in violation of RICO. The Supreme Court upheld forfeiture of the gross amount received even though the appellant paid a portion of that amount to a co-conspirator for his assistance. However, the Court expressly refrained from "resolv[ing] any ambiguity that might be inherent in the terms 'profits' and 'proceeds.'" Id. at 20, n. 3, 104 S.Ct. at 304, n. 3. This Court must now resolve that ambiguity.

The meaning to be ascribed to "proceeds" is significant because that is the operative term in subsection (a)(3). Under § 1963(a)(3), it is only "proceeds" or property derived from "proceeds" that are subject to forfeiture.

In this case, the government contends that "proceeds" means the entire amount laundered by the conspiracy. The defendants, on the other hand, assert that only the "net profits" received by each defendant is forfeitable. This Court finds that RICO requires something between those two extremes.

Implicit in the positions taken by the parties is their recognition that "proceeds" and "profits" are two different things. Russello indicates that the Supreme Court also recognized that the two terms are not synonymous by invariably referring to them in conjunction with each other and never using them interchangeably. Moreover, the Russello court acknowledged that it had not resolved any ambiguity in the "terms 'profits' and 'proceeds.'" Id. (emphasis added). By referring to those terms in the plural, the Court again indicated that it viewed them as separate and distinct.

The language and legislative history of § 1963(a)(3) provide compelling evidence that Congress, too, recognized the distinction between "proceeds" and "profits" and that it intended forfeitable "proceeds" to encompass more than the net gain realized by a defendant. The amendment adding subsection (a)(3) to § 1963 was proposed before but not enacted until after Russello was decided. It was a response to several lower court decisions holding that "proceeds" and "profits" were not "interests" forfeitable under § 1963(a)(1).[7] Its purpose was to make it clear that "proceeds" and "profits" are forfeitable. S.Rep. No. 225, 98th Cong., 2d Sess. 199 (1984), reprinted in, 1984 U.S. Code Cong. & Admin. News 3182, 3382.

Because § 1963(a)(3) was designed to reach "proceeds" and "profits," the fact that the statute uses only the word "proceeds" strongly suggests that Congress intended "proceeds" to have a broader meaning that includes "profits." Such intent is clearly manifested in the following excerpt from the legislative history of § 1963(a)(3)

---

[7] See United States v. Marubeni American Corp., 611 F.2d 763 (9th Cir. 1980); United States v. Thevis, 474 F.Supp. 134 (N.D.Ga. 1979), aff'd on other grounds, 665 F.2d 616 (5th Cir. 1982); United States v. Meyers, 432 F.Supp. 456 (W.D.Pa. 1977).

> In paragraph (3), the term "proceeds" has been used in lieu of the term "profits" in order to alleviate the unreasonable burden of the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were.

S. Rep. No. 225, 98th Cong., 2d Sess., 199 (1984), reprinted in, 1984 U.S. code Cong. & Admin. News 3182, 3382 (footnote omitted).

The commonly understood definitions of the two terms buttress the conclusion that Congress intended "proceeds" to include the gross amount realized from racketeering activity. Webster lists the preferred definition of "proceeds" as "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue: the total mount brought in." Webster's Third New International Dictionary 1807 (1986). "Profit," by contrast, is defined as "the excess of returns over expenditure in a transaction or series of transactions," Webster's Third New International Dictionary 1811 (1986), or "the gross proceeds of a business transaction less the costs of the transaction." Black's Law Dictionary 1211 (6th Ed. 1990) (emphasis added).

That conclusion is further reinforced by the purpose underlying criminal forfeiture provisions in general and RICO in particular. As already noted, the objective of criminal forfeiture is to punish the defendant for committing a crime. Criminal forfeiture provisions were not intended to "require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced." United States v. Lizza Industries, Inc., 775 F.2d 492, 498 (2d Cir. 1985), cert. denied, 475 U.S. 1082, 106 S.Ct. 1459, 89 L.Ed.2d 716 (1986).

Nor can there be any doubt that Congress intended the forfeiture provisions to be interpreted broadly in order to achieve that purpose. The statute creating RICO expressly provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." Russello, 464 U.S. at 27, 104 S.Ct. at 302 (citing § 904(a) of Pub. L. 91-452, 84 Stat. 947).

Furthermore, the practical difficulties inherent in requiring the government to prove the net gains received by a defendant rather than the gross amounts realized from the racketeering activity would frustrate Congress' intent. The precise amount of a defendant's share in the fruits of concerted illegal activity and/or the expenses incurred by the defendant are matters generally known only to the defendant and other participants. Therefore, imputing to Congress an intent that forfeiture extend only to those amounts that the government proves a defendant received as "profits" would be inconsistent with RICO's purpose and would eviscerate the statute. See Caporale, 806 F.2d at 1508; United States v. Milicia, 769 F.Supp. 877, 889-90 (E.D.Pa. 1991) (construing 21 U.S.C. § 853); Cf. Lizza Industries, Inc., 775 F.2d at 498.

Finally, it seems rather incongruous to suggest that the expenses incurred by a defendant in conducting a racketeering enterprise should be deducted in calculating the amount for which that defendant is criminally responsible.

Milicia, 769 F.Supp. at 890. As already noted, criminal forfeiture is a penalty for committing crime. The measure of criminal responsibility is the harm for which the defendant may be held accountable not the net gain realized by the defendant from the crime.

In short, this Court concludes that the term "proceeds" as used in § 1963(a)(3) means the entire amount realized from racketeering activity and not just the "profits" made by a defendant. In addition, such "proceeds" also are forfeitable under § 1963(a)(1) inasmuch as the Supreme Court has determined that the term "interest," as used in that section, comprehends both "proceeds" and "profits." Russello, 464 U.S. at 21, 104 S.Ct. at 299.

B. The Amount "Obtained" by a Defendant

The fact that the "proceeds" of racketeering activity includes the entire amount realized from such activity does not necessarily mean that every member of a RICO conspiracy must forfeit all of the proceeds generated by the conspiracy. Under § 1963(a)(3), a defendant is required to forfeit only property "obtained" by that defendant from the racketeering activity. Therefore, the amount forfeitable by a particular defendant depends on two factors:

1. The amount of proceeds "obtained" by that defendant; and
2. The amount of proceeds "obtained" by co-conspirators for which the defendant is accountable under established principles governing sentencing responsibility for the acts of co-conspirators.

Section 1963(a)(3) provides that such property is forfeitable whether it is obtained "directly or indirectly." Consequently, a defendant may be viewed as having "obtained" proceeds even though that defendant never had physical possession of the proceeds. For example, a defendant who was entitled to a share of the proceeds may be considered to have "obtained" that share despite not having received actual delivery of his share. Similarly, a defendant having an undivided interest in a common pool of proceeds may be deemed to have "obtained" an interest in those proceeds. See Russello, 464 U.S. at 22, 104 S.Ct. at 300 ("Before profits of an illegal enterprise are divided, each participant may be said to own an 'interest' in the ill-gotten gains. After distribution, each will have a possessory interest in currency or other items so distributed.").

Generally, a defendant should not be considered to have "obtained" proceeds that merely passed through his hands or proceeds received by others in which the defendant had no direct interest. See, e.g., 18 U.S.C. § 982(b)(2); United States v. Regan, 699 F.Supp. 36, 39 (S.D.N.Y. 1988) (construing § 1963(a)(2)). However, it is well established that, for sentencing purposes, a defendant is accountable for the acts of co-conspirators that were committed in furtherance of the conspiracy and were reasonably foreseeable by the defendant. U.S.S.C. § 1B1.3(a)(1)(B); United States v. O'Campo, 973 F.2d 1015 (1st Cir. 1992). Thus, the Guidelines expressly require that both base offense levels and adjustments for specific offense characteristics be determined on the basis of "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B). In the case of racketeering activity that involves money laundering offenses, one of the specific offense characteristic adjustments is a function of the amount of money involved (U.S.S.G. § 2S1.1(b)(2)); and, therefore, is calculated in accordance with the principles set forth in § 1B1.3(a)(1)(B). That is to say, it includes the reasonably foreseeable amounts laundered by co-conspirators in furtherance of the conspiracy.

Since criminal forfeiture is a form of punishment, it follows that the same principles of sentencing accountability should apply. For purposes of § 1963(a)(3), a defendant should be deemed to have "obtained" amounts "obtained" by co-conspirators in furtherance of the conspiracy to the extent that receipt of those amounts was reasonably foreseeable. In fact, in applying the forfeiture provisions contained in other statutes, several courts have concluded that conspirators are jointly and severally liable for amounts illicitly received pursuant to the conspiracy. See United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986), cert. denied 483 U.S. 1021, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987) (§ 1963(a)(1); United States v. Wilson, 742 F.Supp. 905 (E.D.Pa. 1989), aff'd, 909 F.2d 1478 (3rd Cir.), cert. denied, 498 U.S. 1016, 111 S.Ct. 589, 112 L.Ed.2d 593 (1990); United States v. Benevento, 663 F.Supp. 1115 (S.D.N.Y. 1987), aff'd, 836 F.2d 129 (2d Cir. 1988) (21 U.S.C. § 853).

Once again, holding otherwise would defeat the overriding purpose of RICO forfeiture which is to deprive those engaging in racketeering activity of the fruits of their illegal conduct. In most cases, it would be a practical impossibility to determine the precise amount of each conspirator's share in the conspiracy's criminal proceeds.

For all of those reasons, this Court concludes that, for purposes of § 1963(a)(3), the proceeds "obtained" by a defendant include all proceeds obtained by that defendant, directly or indirectly, from racketeering activity. It also includes all proceeds obtained by co-conspirators in furtherance of the racketeering conspiracy to the extent reasonably foreseeable by the defendant.

C. Property "Derived From" Proceeds and "Substitute Assets"

Although the amount of "proceeds" "obtained" by a defendant from racketeering activity may be known, the "proceeds" cannot be forfeited if the defendant does not have them. For that reason, § 1963(a)(3) also provides for forfeiture of property "derived from" those proceeds. Moreover, § 1963(m) provides that, where the defendant has concealed, transferred, or dissipated forfeitable property, the defendant shall be required to forfeit other property of equal value.

In order to be considered "derived from" racketeering proceeds, money or property must be traceable to those proceeds in the sense that its acquisition must be attributable to the proceeds rather than to money obtained from untainted sources. However, that does not mean that the very same dollars received as proceeds must have been used to purchase the property subject to forfeiture. See United States v. Ginsburg, 773, F.2d 798, 801 (7th Cir. 1985) cert. denied, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986) (§ 1963(a)(1); United States v. Navarro-Ordas, 770 F.2d 959,969-70 (11th Cir. 1985), cert. denied sub non., Rodriguez v. United States, 475 U.S. 1016, 106 S.Ct. 1200, 89 L.Ed.2d 313 (1986) (§ 1963(a)(1)). Proof that the proceeds of racketeering activity enabled a defendant to acquire the property is sufficient to warrant forfeiture under § 1963(a)(3). See United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987).

There is no such tracing requirement with respect to "substitute assets" under § 1963(m). If a defendant has concealed or disposed of "proceeds" of the illegal activity or property "derived from" those proceeds, any property of the defendant having an equivalent value is subject to forfeiture whether or not it was acquired from racketeering activity. In this respect, the "substitute assets" provision is more in accord with historical notions of criminal forfeiture because no direct link is required between the crime and the property subject to forfeiture.

III. The Criminal Forfeiture Statute - 18 U.S.C. § 982

In the case of individuals convicted of substantive CTR or money laundering offenses, § 982 requires forfeiture of "any property . . . . involved in such offense or any property traceable to such property." 18 U.S.C. § 982(a)(1) (emphasis added). It is not clear why § 982 uses terms different from those used to describe property subject to forfeiture under § 1963. By providing for forfeiture where the property is "involved" in the offense, § 982 is more reminiscent of in rem civil forfeiture. Indeed, § 982 expressly incorporates the civil forfeiture provisions of 21 U.S.C. § 881(d) relating to property connected to drug offenses except to the extent that they may be inconsistent with the criminal forfeiture provisions. 18 U.S.C. § 982(b)(1)(A), 21 U.S.C. § 853(j).

In any event, any departure from traditional notions of in personam criminal forfeiture suggested by the terminology used in § 982 has no impact on this case. Property is "involved" in CTR or money laundering offenses whether it was the subject of those offenses or whether it was the proceeds generated by them. Moreover, § 982 incorporates the "substitute assets" provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853(p)) which, in most respects, is identical to the corresponding RICO provision. Compare 21 U.S.C. § 982(b)(1)(A) with 18 U.S.C. § 1963(m). It is true that, unlike RICO, § 982(b)(2) expressly states that the "substitute assets" provision

> shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

Section 982(b)(2) (emphasis added).

However, in this case, the only defendants who arguably might be construed as intermediaries (i.e., Kenneth Saccoccio, James Saccoccio, and Stanley Cerilla) also were convicted under 31 U.S.C. § 5322(b) for having been involved in a pattern of illegal activity involving more than $100,000.00 during a twelve month period. Since that pattern consisted of more than three transactions, the intermediary exception under § 982(b)(2) does not apply.[8]

IV. The Amount Forfeitable

In this case, the "proceeds" from the defendants' racketeering activity were $136,344,231.86. That was the amount laundered by the conspiracy consisting of the defendants who did the laundering and the Colombian drug traffickers who provided the money to be laundered and received the money after it had been laundered.[9]

However, as already noted, that does not necessarily mean that each defendant must forfeit that entire sum. The amount forfeitable by a defendant convicted of a RICO conspiracy depends on the proceeds obtained by that defendant and the proceeds foreseeably obtained by co-conspirators pursuant to the conspiracy.

In this case, there is little evidence regarding the amounts directly obtained by each defendant. There was evidence that Stephen Saccoccia received commissions ranging from 5% - 15% of the sums laundered and that various other defendants received unspecified commissions and/or salaries. However, the precise amounts are unknown.

---

[8] Kenneth Saccoccio was convicted of fourteen counts of structuring in violation of 31 U.S.C. § 5324(3). James Saccoccio was convicted of fifteen counts of structuring in violation of 31 U.S.C. § 5324(3). Stanley Cerilla was convicted of only one count of structuring in violation of 31 U.S.C. § 5324(3), but the evidence indicates that he was involved in numerous other transactions during the course of the conspiracy.

[9] Actually, the proceeds were greater because this figure represents only the amounts laundered and does not include "commissions" ranging from 5% - 15% received by Stephen Saccoccia. However, the sum of $136,344,231.86 is used because that is the amount set forth in the forfeiture allegations in the indictment.

What is known is the amount of proceeds realized by all conspirators, in the aggregate, and the portions reasonably foreseeable by each conspirator. The evidence clearly demonstrated that every defendant, except Carlo DeMarco, was active in the conspiracy's money laundering operations between January 1, 1990 and April 2, 1991. During that period, $136,344,231.86 was laundered and returned to the Colombian drug traffickers as their share of the illicit profits. The evidence also establishes that the Saccoccias' activities spanned the entire spectrum of the conspiracy's operation from receiving of the cash in New York to writing laundered proceeds back to Colombia. Vincent Hurley and Anthony DeMarco also participated directly in most facets of the overall scheme including collecting cash from couriers, transporting it to Rhode Island, counting it and dividing it into smaller lots so that it could be taken to banks to purchase cashier's checks, and in DeMarco's case, sending some of the money to IMM to be laundered in California. Therefore, it is clear that the Saccoccias, Vincent Hurley, and Anthony DeMarco reasonably could have foreseen the receipt of $136,344,231.86 in proceeds.

On the other hand, the roles of the Saccoccio brothers, Cerilla, and Pizzo and, therefore, their perceptions of the amounts being laundered, were more limited. Although they were participants in the same conspiracy, their function was confined to counting the cash that was transported to Rhode Island and arranging for the purchase of cashier's checks and the deposits into Trend's account at Citizens. There is not evidence that they were involved directly in the money laundering activities occurring outside of Rhode Island or that they knew or had any interest in the amounts laundered at other places. Certainly, a strong argument can be made that they reasonably could have foreseen that their co-conspirators were laundering more than just the cash transported to Rhode Island. However, under these circumstances, such generalized knowledge is not a sufficient basis for requiring them to forfeit those amounts. Accordingly, the Court finds that the amounts forfeitable by the Saccoccios, Cerilla, and Pizzo under RICO is the $37,456,100.79 laundered through Trend and Saccoccia Coin.

Since the Saccoccios and Cerilla were convicted of substantive offenses requiring forfeiture under § 982 they also must forfeit the amounts involved in those offenses. As already noted, those amounts are as follows:

James Saccoccio	$707,750.00
Kenneth Saccoccio	$665,750.00
Stanley Cerilla	$ 52,800.00

Of course, those amounts have already been taken into account in calculating the amounts forfeitable under RICO. Therefore, they are included in and are not in addition to the $37,456,100.79 that they must forfeit under § 1963.

In the case of Carlo DeMarco, the evidence shows that his participating in the conspiracy extended from August, 1991 to November, 1991. Because of that, the government concedes that the amount that he reasonably could have foreseen is limited to the $3,000,000.00 that he helped count at the Saccoccias' apartment in August, 1991, and the $927,357.55 represented by money order receipts, check carbons, and deposit tickets found in his apartment at the time of his arrest. Thus, the total amount forfeitable by Carlo DeMarco under the RICO conspiracy statute, the only offense for which he was convicted, is $3,927,357.55.

WEDNESDAY, NOVEMBER 25, 1992
DECISION/MOTIONS TO SEVER/MOTION FOR MISTRIAL

MR. HILL: No, sir, I don't think I need that at this moment or at this time. What I have indicated to him today and what I would indicate to the Court is that because of my inopportune or unfortunate trip to Austria to obtain information in this case, I have been away for sometime as their guest. And subsequent to their acquitting me of that incident, they've -- I've now determined that there is a potential or there is a very real conflict in that the Government be its counsel has intimated that I would be charged or investigated or called as a witness in this case or that they would move to disqualify me. All of those things, it's my understanding as related to me by my co-counsel have transpired.

Sir, it's my belief and understanding in my commitment that if I am a co-Defendant or it I am an unindicted co-conspirator or investigated or a witness, that I have a very real conflict of interest with my client which can be resolved but it would have to be by his intelligent waiver after consulting with counsel to explain him the nature of our conflict. I have retained a lawyer to discuss,

* * *

his lawyer, he has to first make an intelligent waiver of that conflict, I believe.

THE COURT: The question the Court is asking, Mr. Hill, is though you are concerned that you might have a conflict if you were called upon to defend Mr. Saccoccia in the trial.

MR. HILL: Yes.

THE COURT: The Court is -- you haven't explained to the Court what conflict you would have in discussing with Mr. Saccoccia what he ought to do at this point if Mr. Adae's motion to withdraw is granted.

MR. HILL: Well, I am sorry. I'm trying to respond to your question, sir. I apologize if it seems I am being nonresponsive. I don't think I can give him any advice, Judge, because of the conflict and I don't, really, I am not in a posture because of my absence and complete lack of information about this case. I don't know if you are aware of the situation but I was not allowed to communicate with anyone about this case or receive any communication about this case. So I have no idea what has transpired other than what little information I

* * *

not as a practicing lawyer then as a human being.

Now, having made its ruling on Mr. Adae's motion to withdraw, we turn now to your situation, Mr. Hill.

You are now counsel of record to Mr. Saccoccia. You have not moved to withdraw nor does the Court see any basis for permitting you to withdraw. You have expressed a fear of a possible conflict of interest because of some apprehension you may about what position the Government might take with respect to your continued participation. That apprehension does that seem to be borne out by what Mr. Leavey has previously told the Court. And, therefore, the Court sees no conflict at this point at least, insofar as your ability to make a determination as to what you wish the Court to do.

Now, as things presently stand, the status quo is that as counsel of record you would be called upon to step in and represent Mr. Saccoccia when the trial resumes next week. The court is cognizant of your situation during the past couple of months and takes seriously your statement as to how much time you feel you would need to prepare the case.

* * *

MR. LEAVEY: Objection, Your Honor.
THE COURT: Sustained.

Q What, if any, were the findings or the conclusions of the DEA test in connection with this contamination of money?

MR. LEAVEY: Objection.
THE COURT: Sustained.

Q Did the DEA reach conclusions in its test regarding this money?

A Yes, sir.

Q What was it?

MR. LEAVEY: Objection, Your Honor.
THE COURT: Sustained.

Q Do you know the conclusions?

A Yes, I do.

Q Are you able to provide them?

A Yes, sir.

Q What are the results?

MR. LEAVEY: Objection.
THE COURT: Sustained.

Q Are these tests information that the DEA gave, that the DEA test, is this information which you assimilate and study in connection with your field of expertise?

A Yes, it is.

Q And are you, I believe you stated, familiar with this particular test?

A Yes, I am.

Q Would you indicate to the Jury what the outcome of the test was?

MR. LEAVEY: Objection.
THE COURT: Sustained.

Q With regard ---

MR. HILL: Excuse me. I withdraw

that. May I have just a moment, Your Honor, in view of the state of the record?

THE COURT: Yes.

(PAUSE)

Q Sir, have you relied on the results or the findings of the DEA study in 1986, of which you previously referred, in connection with your conclusions and expertise that you have indicated to the Court today?

A Yes, sir.

Q So with regard to the contamination of money about which I believe you testified there is widespread contamination of money, is that right?

A That's correct.

* * *

the dog sniffing evidence. And as counsel have pointed out, the fact that there was evidence that trained dogs detected the presence of cocaine on some of the currency that was brought into banks by certain of Mr. Saccoccia's confederates, does not conclusively prove that Mr. Saccoccia or the confederates were engaged in drug trafficking. It is pretty powerful evidence that these bills were connected with drug trafficking at some point. But certainly it does not conclusively prove that it was these Defendants who engaged in the activity that caused the bills to become tainted. But it is admissible evidence and, as the Court has said before, it certainly constitutes one link in the chain of evidence necessary to convict.

The second category of evidence is the testimony by Mr. Garcia. And, specifically, Mr. Garcia's testimony as to what he was told by Fernando Duenas.

Now, the Defendant contends that the testimony from Mr. Duenas was inadmissible at the time the Court admitted it. The Court stated that that evidence was admitted both as a statement against interest by

* * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1618
No. 93-2208
No. 94-1506

UNITED STATES,
Appellee,

v.

STEPHEN SACCOCCIA,
Defendant-Appellant.

BEFORE

TORRUELLA, Chief Judge,
SELYA, CYR, BOUDIN, STAHL AND LYNCH, Circuit Judges

ORDER OF COURT

Entered: September 27, 1995

The panel of judges that rendered the decision in these cases having denied the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Francis P. Scigliano
Clerk

{cc: Messrs. Rosenthal and Ianotti]